



Neutral Citation Number: [2025] UKUT 151 (LC)

Case No: LC-2024-686

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

Ref: CHI/00ML/HMF/2023/0028

Royal Courts of Justice, Strand,
London, WC2A 2LL
16 May 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – application for fresh evidence to be admitted on appeal – application failed because the evidence could with reasonable diligence have been produced to the First-tier Tribunal – allegations of forgery – burden of proof

BETWEEN:

MIROSLAW SZYMCZAK

Appellant

and-

NAFEESA BEGUM LIMITED

Respondent

55 Rosedale Road,
Brighton.
BN1 7GB

Upper Tribunal Judge Elizabeth Cooke
13 May 2025

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The following cases were referred to in this decision:

Ladd v Marshall [1954] 1 WLR 1489

Introduction

1. It is an important principle of litigation that a party generally gets just one shot at producing the evidence needed to prove his or her case. It is not usually permissible to adduce fresh evidence in an appeal, because it is not fair to allow a claimant or applicant to mount repeated attacks; it is their responsibility to set out their case at first instance so that the defendant or respondent knows the case they have to answer. Once a decision has been made on that case and that evidence the applicant will not be allowed try again by producing more evidence. An exception can be made where the evidence could not with reasonable diligence have been produced at first instance, it is credible, and it would have had an important influence on the outcome (*Ladd v Marshall* [1954] 1 WLR 1489).
2. Those three requirements are cumulative. Evidence that is credible, and might well have changed the outcome, will not be allowed where with reasonable diligence it could have been produced at first instance.
3. The present appeal was brought with conditional permission; the appeal would proceed only if the applicant succeeded in his application for permission to adduce fresh evidence. As will be seen, the conditions set out in *Ladd v Marshall* were not all met, the evidence could not be admitted, and the appeal fails.
4. The appeal is brought by Mr Szymczak, as a former tenant of 55 Roedale Road, Brighton, against the refusal of the First-tier Tribunal (“the FTT”) to make a rent repayment order against his landlord, Nafeesa Begum Limited. Neither party has been legally represented; Mr Szymczak presented his own case, and the landlord was represented by one of its directors, Mrs Farah Entwistle.

The legal and factual background

5. Section 40 of the Housing and Planning Act 2016 (“the 2016 Act”) provides that the FTT may make a rent repayment order against a landlord if it is satisfied, to the criminal standard of proof (beyond reasonable doubt), that the landlord has committed any of the offences listed in section 40(3). The list includes the offence created by section 72(1) of the Housing Act 2004 of managing or being in control of a house that requires to be licensed as a house in multiple occupation (an “HMO”) and is not so licensed. Section 254 of the 2004 Act provides a number of definitions of an HMO; the relevant one for the purposes of this appeal describes a house where rooms are let to tenants who share living facilities such as a kitchen and bathroom. Not all HMOs require a licence but in the present case it was not in dispute that in the area where the property was situated an HMO would require a licence if three or more persons were living there, it was their only or main residence, and they comprised at least two separate households; I assume that that was because the local housing authority had designated the area as being subject to additional licensing requirements under section 56 of the 2004 Act.
6. 55 Roedale Road, Brighton is a house with four rooms furnished as bedrooms together with a shared kitchen and bathroom. Mr Szymczak rented a room there from 1 September 2021 to 30 September 2022. He applied to the FTT for a rent repayment order on 29 September 2023, claiming that the property was an unlicensed HMO throughout his tenancy. It was not agreed that the property was an HMO that required a licence.

7. Section 41 of the 2016 Act states:

- (2) A tenant may apply for a rent repayment order only if —
 - (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

- 8. Because the application was made on 29 September 2023, that period of 12 months began on 30 September 2022, which it was agreed was the last day of Mr Szymczak's tenancy. The consequence of the two limbs of section 41(2) is that the application could not succeed unless he could prove that the offence was being committed on that specific date, whether or not it was committed at any other point during his tenancy and whether or not it was being committed at any later date. That made his task in the FTT quite difficult, but that was the consequence of his application having been made on the last possible date.
- 9. Mr Szymczak's initial application to the FTT referred to there being other tenants but gave no names and no information about any of them. In response to the landlord's statement of case, in which it was denied that at any point there were three or more occupiers whose only or main residence was the property, Mr Szymczak named a number of other tenants and gave the dates on which they had moved into and out of the property.
- 10. In the FTT's decision it can be seen that the focus at the hearing in July 2024 was on whether it could be shown that the property was an HMO that required a licence on 30 September 2022, on the basis that if it was not then any other material was irrelevant. Mr Szymczak said that the other occupiers on that date, in addition to himself, were Menna Elwakeil, Daniela Coates and a man called Ciaran, but provided no evidence of this beyond his own assertion. A number of other tenants were also said to have been present during the time when Mr Szymczak lived at the property, including a Ms Scarlett Kennedy. The landlord's position as set out by Mrs Entwistle was that while Mr Szymczak and Ciaran were living at the property as their main residence on 30 September 2022, other occupiers were short-term residents who stayed there as students, or on business, and the property was run in part as an Airbnb. Mrs Entwistle said that Scarlett Kennedy stayed at the property from September 2021 to June 2022, but that she was a student and the property was not her main residence. Mr Szymczak disagreed, and maintained that material produced by the landlord demonstrating the Airbnb bookings was falsified on the basis that it included inconsistent dates. Mrs Entwistle said that Daniela Coates had lived at the property on a temporary basis while she was looking for a job as a teacher and has signed an assured shorthold tenancy agreement on 2 October 2022, after Mr Szymczak had left.
- 11. The FTT recorded that the landlord had produced an agreement showing that Menna Elwakeil's occupation was part-time. It also noted that after the hearing the landlord provided occupancy agreements signed by a David Cadet and a David Ellisdon which indicated that they occupied the property for a few days a week, but it said that it could give little weight to that evidence since neither Mr Cadet nor Mr Ellisdon attended the hearing.
- 12. In conclusion the FTT said that on balance Mr Szymczak was a more credible witness and that it had doubts about some of Mrs Entwistle's evidence, but that Mr Szymczak's case was based purely on his own assertions and denials. None of the other occupiers of the property had provided witness statements or attended the hearing and there was no

documentary evidence about the basis of their occupation. Accordingly the FTT was not satisfied beyond reasonable doubt that the offence had been committed on 30 September 2022 (or at all), and the application failed.

The appeal

13. In his grounds of appeal Mr Szymczak asserted that the tenancy agreement with Menna Elwakeil was produced by the landlord's representative during the hearing, and that he was not given a copy during the hearing and therefore could not comment on it. When it was sent to him later he discovered that the meta-data indicated that it was created on the day of the hearing. He took the view that it had been forged by the landlord.
14. With his grounds of appeal Mr Szymczak supplied copies of the assured shorthold tenancy agreements for Scarlett Kennedy and for Daniela Coates, which he said he had been unable to obtain before the FTT hearing; the agreements indicated that each was required to live at the property as her only or principal residence. Each agreement was for a period of 12 months, and Ms Coates' agreement ran from July 2022.
15. Mr Szymczak was granted permission to appeal in the following terms:

“1. If the documents which the applicant now has access to and wishes to rely on in support of the appeal can be taken into account, there is a realistic prospect of him persuading the Tribunal to accept that the FTT reached the wrong conclusion on the periods of occupancy and whether those who had rights of occupation were in occupation of the property as their main residence. Those documents appear to show, in particular, that Daniela Coates was granted a tenancy earlier than the respondent suggested and that Scarlett Kennedy was granted an assured shorthold tenancy requiring her to reside in the property as her only or main residence.

2. Whether the applicant should be entitled to rely on the new material which was not provided to the FTT remains to be decided and will be considered at the start of the appeal hearing. The applicant may rely on the statement he has submitted explaining the attempts he made to obtain the documents before the hearing and the respondent may make submissions opposing the applicant's application to be allowed to rely on it.”

The application for permission to rely on new evidence

16. Both parties sent additional material to the Tribunal prior to the appeal hearing, for which no permission had been given, including purported tenancy agreements and witness statements. Mrs Entwistle sought to challenge the FTT's finding that it had been agreed that Ciaran was in occupation for the property as his home on 30 September 2022, and Mr Szymczak applied for a witness summons to compel Ciaran to give evidence. I explained to the parties that matters that were agreed before the FTT could not now be challenged. None of the additional material was considered by the Tribunal and the hearing proceeded as set out in paragraph 2 of the permission to appeal. Mr Szymczak's statement explaining his attempts to obtain the tenancy agreements of Scarlett Kennedy and Daniela Coates before the FTT hearing said this:

“I was not able to reach Scarlett and Daniela before the hearing. Scarlett didn’t respond to my messages and I wasn’t able to contact Daniela before the hearing due to a change of my phone I lost contact details and I had to retrieve her number from a backup of my old phone.”

17. Copies of Whatsapp messages in the appeal bundle indicated that Mr Szymczak was in contact with Ms Kennedy briefly in October 2022, when he told her that the property had not had an HMO licence. Her Whatsapp message in reply said “Farah [Entwhistle] has actually been in contact with me and asked me not to give the dates of my tenancy. But I had no idea what it was in relation to and just ignored it.” There was then no contact between them for 21 months; when Mr Szymczak asked for a copy of her agreement on 29 June 2024 (three weeks before the hearing) there was no reply until he chased in September 2024, explaining that he was appealing the FTT decision. At that point Ms Kennedy sent him a copy of her agreement, apologised for not replying sooner, and said that his message had gone to her email archive and that when she saw it she assumed it was too late. As for Ms Coates, Mr Szymczak explained that he had not made any attempt to retrieve her contact details before the FTT hearing because she had arrived at the property shortly before he left and he had more contact with the other tenants.
18. I have to say that Mr Szymczak has not come close to showing that these two tenancy agreements could not with reasonable diligence have been produced to the FTT. So far as Ms Kennedy was concerned the question does not seem to have been asked until a very late stage. As to Ms Coates, no attempt was made at all before the FTT hearing. Mr Szymczak explained that he did not think that he would need that evidence, and that he expected Mrs Entwhistle to accept that the property was an HMO that required a licence on 30 September 2022.
19. Mr Szymczak asserted that Mrs Entwhistle told the other tenants not to produce their agreements for him, and I have to consider whether that made it difficult for him to obtain them. So far as Ms Kennedy is concerned, the message in October 2022 was not a refusal to provide a copy of the agreement and there is no indication that Mr Szymczak actually asked for it at that stage. A message sent three weeks before the hearing did not come to her attention in time, but she provided a copy readily when she became aware that he wanted one for the purposes of the appeal. So there was no reluctance to provide a copy, and it is a reasonable inference that had Mr Szymczak asked her in good time he would have been able to produce her tenancy agreement at the hearing.
20. As for Ms Coates, there is no suggestion (nor any evidence) that Mrs Entwhistle tried to interfere; there was simply no effort made to contact her.
21. The two documents are apparently credible, although Mrs Entwhistle does not agree that they are genuine. Had they been produced at first instance they might have had an influence on the outcome depending upon whether the FTT found that they were genuine and upon whether it found that Ms Coates actually moved into the property as her main residence in July 2022. I do not think that the FTT could have been sure of that on the basis of the tenancy agreement alone. But in any event Mr Szymczak fails at the first hurdle; he cannot show that the evidence could not with reasonable diligence have been produced to the FTT.

The alleged forgery

22. In the grounds of appeal Mr Szymczak alleged that Mrs Entwistle forged her copy of Menna Elwakeil's tenancy agreement. I have set out the grant of permission to appeal in full at paragraph 15 above in order to make it clear that permission to appeal was not granted on this ground. Nevertheless, because much was made of that allegation at the hearing before the Tribunal I make the following comments about it.
23. There was a copy of that copy agreement in the appeal bundle; it purports to be an agreement for a lodger, for three days per week, with a resident landlord; it bore the printed date 21 September 2021 and appears to have been signed by the landlord but not the tenant.
24. Mr Szymczak said that Mrs Entwistle disconnected from the FTT hearing (which she was attending remotely, while he attended in person at Havant). He then took a break to go to the bathroom. The FTT referred in its decision to her having produced the agreement with Menna, and he inferred that the agreement had been emailed to the FTT during the hearing while he was taking a break, so that he had no opportunity to comment on it. On checking the meta-data for the document he noted that it had been created on 23 July 2024 and he inferred that it had been forged; he also said that the details in the document – a low rent, reference to a resident landlord, and the fact that Mrs Entwistle had signed it on behalf of the landlord which he said was not her usual practice – showed that it was not genuine.
25. Mrs Entwistle explained that she sent the copy agreement to the FTT by email just after the end of the hearing, having converted it from a Word document to a pdf. There is a copy of that email in the appeal bundle; it was sent to the FTT and not to Mr Szymczak at 12:24 on 23 July 2024. I am told the hearing was a short one. Two days later, on 25 July 2024, Mrs Entwistle sent a further email to the FTT in which she said "I was confused, I sent you the wrong short term agreements, these 2 agreements demonstrate that the house was let to 2 short term lets as at the 30/10/2022." Attached were the agreements with David Cadet and David Ellison.
26. I observe that if Mrs Entwistle converted the document from Word to pdf that would explain why the document appeared to have been created on 23 July 2024. There is no compelling evidence that it was fabricated. The withdrawal of the document from the FTT was not admission that it was fabricated. Mrs Entwistle said at the appeal hearing that it was not a genuine document, but I do not take that as an admission of wrongdoing; it is consistent for example with her having produced, in error, an agreement that was never completed.
27. Whether or not that document was fabricated, the important facts about it are, first, that Mr Szymczak had no opportunity to comment on it (whether it was sent during or after the hearing, as to which I make no finding) and, second, that it was withdrawn. If the FTT's decision had depended upon a finding that the document was genuine then the decision would certainly have been made in error, not because there was anything obviously wrong with it but because Mr Szymczak had not seen it and because it was in any event withdrawn and therefore not relied upon by Mrs Entwistle. But the FTT made no finding about whether or not the document was genuine. It mentioned the document in a paragraph explaining the disagreement between the parties but was, I think, careful not to make a finding about it. What it said after its discussion of the evidence was that it had doubts about Mrs Entwistle's credibility but that Mr Szymczak had not proved his case.

28. As I said above, permission to appeal was not granted on the basis of the allegation of forgery. I have commented upon it only because it was a major focus for both parties at the appeal hearing, and it is important to say that the forgery allegation is not convincing. The agreement should arguably have been ignored by the FTT because it was withdrawn, but that casts no doubt upon the correctness of the FTT's decision because the decision depended not upon evidence produced by the landlord but upon the absence of evidence from Mr Szymczak.

Conclusion

29. Mr Szymczak's application to the FTT failed because he produced no evidence beyond his own assertions, which were contested by the landlord. The FTT had its doubts about Mrs Entwistle's credibility, but it could not be satisfied beyond reasonable doubt that what Mr Szymczak said was true. His application for permission to adduce fresh evidence on appeal fails because he has not shown that he could not with reasonable diligence have produced that evidence to the FTT. The application to adduce fresh evidence fails, and therefore the appeal cannot proceed.

Upper Tribunal Judge Elizabeth Cooke
16 May 2025

Right of appeal

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