UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 96 (LC)
UTLC Case Number: RRO/8/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – unlawful eviction – landlord's failure to obtain an HMO licence – burden of proof that offences have been committed

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

BETWEEN:

PAULINUS CHUKWUEMERA OPARA **Appellant**

and

MS MARCIA OLASEMO **Respondent**

Re: 90 Ennis Road (ground floor room),
Plumstead,
London, SE1 2QT

Judge Elizabeth Cooke

Determination on written representations

Flat Justice for the appellant
Mr James Sandham for the respondents, instructed by Portner solicitors

The following cases are referred to in this decision:

Re H (Minors) (Sexual Abuse: Standard of proof) [1996] AC 563

Williams v Horsham District Council [2004] EWCA Civ 39

Introduction

1. This is Mr Opara's appeal from the decision of the First-tier Tribunal ("the FTT") to refuse his application for a rent repayment order. It refused because it was not satisfied to the criminal standard of proof that the respondent Ms Olasemo had committed the criminal offences either of unlawful eviction or of managing of a house in multiple occupation ("HMO") without a licence. The appellant says that the FTT should have been so satisfied, and did not take proper account of the evidence before it.

2. Permission to appeal was given by the FTT, and the Tribunal directed that it be determined under the Tribunal's written representations procedure. That direction was given in December 2019 and was not the result of the current emergency. The appellant has been represented by Flat Justice and the respondent by Mr James Sandham of counsel, instructed by Portner solicitors. I am grateful to the representatives for their helpful submissions. Flat Justice has supplied copies both of the bundle the appellant produced for the FTT and of the documents that the respondent produced.

3. The appeal succeeds and the matter is remitted to the First-tier Tribunal. In the paragraphs that follow I set out the law and the factual background and summarise the FTT's decision. I then consider the grounds of appeal and the parties' arguments, and explain my conclusion.

The law

4. Section 40 of the Housing and Planning Act 2016 enables the FTT to make a rent repayment order in favour of a tenant if the landlord has committed certain offences during the tenancy. The offences include the eviction or harassment of occupiers, under section 1(2), (3) or (3A) of the Protection from Eviction Act 1977, and the offence of being in control of or managing an unlicensed HMO.

5. The tenant may apply for a rent repayment order only if the offence relation to housing that was let to the tenant at the time of the offence, and was committed within the 12 months ending on the date of the application (section 41). The FTT may make an order if it is "satisfied, beyond reasonable doubt", that one of the listed offences has been committed (section 43).

6. So in this case it was for the appellant to prove, to the criminal standard of proof, that the offences he alleged had been committed, on a date or over a period that brings him within section 41. The appellant says that two offences were committed: one of unlawful eviction, and one of failure to hold an HMO licence.

Unlawful eviction

7. Section 1(2) of the Protection from Eviction Act 1977 says:

> "If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so, he shall be guilty of an offence unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased to reside at the premises."

The licensing of HMOs

8. Section 254 of the Housing Act 2004 ("the 2004 Act") defines HMOs using a number of "tests". The test relevant to this appeal is the "standard test" in subsection (2) which states that a building or part of a building is an HMO if:

> "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

9. Section 258 states that people are to be regarded as not forming a single household unless they are members of the same family, or match a description specified in regulations.

10. Not all HMOs satisfying the test set out above need to be licensed. Section 61 of the 2004 Act requires every HMO to which Part 2 of the 2004 Act applies to be licensed, subject to certain exemptions that are not relevant here. Part 2 of the 2004 Act applies, according to section 55(2), to

    a. any HMO falling within any prescribed description of HMO, and

    b. any HMO in an area that is designated under section 56 as subject to additional licensing if it is within the description specified in the designation.

11. Regulations made under section 61 prescribe descriptions of HMO for that purpose, and include a requirement that the building is occupied by five or more persons living in two or

more separate households. That prescribed description is not relevant to this appeal because the property is in an area designated by the local authority under section 56, with effect for five years from 1 October 2017. That designation requires the licensing of HMOs occupied by three or more persons in two or more separate households. It is the appellant's case that the property met this description.

12. Section 72(1) of the 2004 Act provides that a person commits an offence if he has control of or manages an HMO which is required to be licensed and is not so licensed.

The factual background

13. The relevant facts, as found by the FTT are as follows:

14. 90 Ennis Road is a mid-terrace house with a kitchen, a bathroom and four other rooms on the ground and first floors, and a self-contained one-bedroomed flat in the basement. The respondent has been the registered proprietor since 2004. In December 2016 the respondent let a room in another house to the appellant; he was not comfortable there, and in February 2017 moved into room 2 at 90 Ennis Road, paying £450 per month. A couple of weeks later room 1 - the ground floor front room - became available and the respondent offered it to the appellant who took it instead of the first room, for £420 per month.

15. After that, room 2 was occupied by a man named Ekene, who did not stay long, and then from March 2017 to July 2018 by Mr William Neville. He made an application for Housing Benefit, and the evidence of Ms Patricia Gravell, a local authority housing officer, was that he was paid Housing Benefit of £84.27 per week from 1 October 2017 to 9 July 2018. Room 3 was let to a range of different people for a while, and then stood empty; at some point a lady known as Manuela moved in. Eduard, or Eduardo, Gradinaru (known as Eddie) lived in room 4; he moved out in June 2018.

16. The FTT said that it was "well satisfied on overwhelming evidence that Ms Olasemo controlled or managed the Property and let each of the four rooms as bedrooms to individuals" (paragraph 40 of the FTT's decision). The FTT rejected the respondent's evidence that the property was a three-bedroomed flat with one living room let to Eddie and to Sandu Stan, and that she first met the appellant outside the property in February 2017 and assumed that Eddie and Mr Stan had sublet a room to him. The FTT added that it was reinforced in its rejection of the respondent's account by extensive text messages which show that she was closely involved in managing the property and in sorting out disputes between the residents.

17. On 25 June 2018 the local housing authority wrote to the respondent to say that it had information to suggest that the property was being used as an HMO. On 2 July 2018 the respondent applied to be placed on the electoral roll and claimed that she was living at the property. The FTT found that that was not true.

18. In June 2018 the appellant was struggling to pay his rent on time. He said he wanted to leave once his immigration status was determined. A series of text messages records a conversation between him and the respondent, who was unhappy about his difficulties with

the rent. At this time the respondent was having the interior of the property painted, and some of the messages relate to that. On 18 June she suggested that he go and stay with a friend. On 6 July 2018 the respondent said she would not accept any rent from the appellant.

19. On 6 July 2018 the appellant got home at 1830. He entered the house using his key to the main door, and then tried to open room 1 with his room key, but it would not open. Some of his belongings had been put into black plastic bin bags and left in the kitchen. Some of his shirts were on hangers on a rail in the hallway.

20. The appellant slept on a bus that night. On 7 July he returned to the property and spent the night on the sofa in Eddie's room, but left in the morning when the painters arrived. He collected some of his belongings on 10 July and then again in August by arrangement with the respondent. His evidence was that he was homeless until early August and that he has retrieved some, but not all, of his belongings; he has lost a number of documents, certificates and papers.

The decision in the FTT

21. The appellant sought a rent repayment order on the basis that the respondent committed the offences both of managing an unlicensed HMO and of unlawful eviction. The FTT came to the conclusion "with a good degree of reluctance" that it could not make a rent repayment order because it could not be satisfied to the criminal standard of proof that either of the offences had been committed.

22. As to the HMO licensing offence, the FTT found as I said above that the respondent let each of the four rooms to an individual, and controlled or managed the property. None of the individuals was related "except for Eddie and Manuela who were siblings", and the residents did not form a single household. The FTT found that the appellant lived there as his only or main residence from January 2017 to July 2018, and that does not seem to be in dispute (nor could it plausibly be, on the basis of the evidence the FTT heard). But the FTT was not satisfied that the others were occupying the property as their only or main residence.

23. As to the unlawful eviction the FTT was persuaded by Mr Sandham's closing submissions that there was no evidence that the respondent had changed the lock on the door of room 1; he suggested that the lock might have broken or might have stuck because it had just been painted. There were some "reasonably friendly" messages between the appellant and the respondent about his picking up his belongings. His belongings were not thrown out into the street and might have been moved by the decorators. The FTT also noted that the appellant "did not make any endeavours whether legally or practically to get a locksmith along to gain access to his room." The FTT considered it possible that the respondent's case was correct: that there was no real problem with the lock, that the appellant had mis-read the situation, that the respondent's text messages were not intended as a notice to quit and that he was welcome to move back in.

24. But that was not the FTT's finding. The FTT concluded that it would have been satisfied on the balance of probabilities that the respondent had "procured Mr Opara to vacate so that she could move herself in and bring her HMO problems to a close." But it could not be so satisfied beyond reasonable doubt. It said, "a number of factors just did not chime" and "we have some doubts". Therefore it could not be satisfied to a criminal standard and the application failed.

The appeal

25. The appellant says that the evidence was such that the FTT could not have failed to find that the offences were proved to a criminal standard. I will look at the two offences in turn, in the light of the evidence given to the FTT which comprised witness statements from the appellant; from Ms Gravell, who made a witness statement in order to exhibit text messages on the appellant's phone, because he did not know how to do it; from Mr Steven Ahearne, one of the decorators at the property in July 2018; and from the respondent herself. The appellant and the respondent attended the hearing and were cross-examined.

The HMO offence

26. The one element of the HMO definition that the FTT did not find proved to the criminal standard was the requirement that the occupants be living there as their only or main residence.

27. As noted above, there were four rooms. The appellant accepts that Manuela's main home was in Romania, so the occupiers in question were the appellant, Eddie and Mr Neville. That the appellant lived there as his home is not in dispute.

28. As to Eddie and Mr Neville, the FTT made findings of fact – from which there is no appeal – that they rented rooms in the property. The text messages paint a picture of the nature of that occupation. The property seems to have been a chaotic and sometimes dangerous place where the residents had stormy relationships with each other and with the respondent. But the picture is clearly of a place where people lived as their home, and not as guests or as people who did not actually live there.

29. The respondent herself in her second witness statement refers to the residents as making arrangements in "their home". Her evidence indicates that Eddie lived in the property for some years with Mr Stan. Eddie took charge of meter payments (a source of friction among the residents); he seems to have gone through a very difficult time after a bereavement and to have threated suicide, and she contacted his family on some occasions – none of which is consistent with him being based anywhere else.

30. The text messages indicate that Mr Neville was a difficult and anti-social resident, who prevented other from using the bathroom and would hide in his room for long periods. It is significant that he received Housing Benefit. Mr Sandham says "The fact that a department within local government has been told by an unidentified person that a property is a person's main residence does not make it true". That is correct; but the benefit claim is evidence nonetheless. Texts quoted by the FTT show that around June and July 2018 the

respondent wanted Mr Neville to leave and had difficulty getting him to do so. It is also significant that the local housing authority thought that the property was an HMO and had contacted the respondent about the need for a licence.

31. It is true that neither Eddie nor Mr Neville was called to give evidence. In the absence of co-operation from other residents, cast-iron certainty is not going to be achievable on this point because of the difficulty of proving a negative; and of course cast-iron certainty is not required, only proof "beyond reasonable doubt". How is the tenant to show that another occupant has no other home, or no other main home? This element of the offence must to some extent be a matter of inference from the circumstances.

32. I take the view that there was strong evidence that Eddie and Mr Neville had their home at the property – in Eddie's case this seems to have been accepted by the respondent. This is low-value housing – cheap rooms, to be blunt. The tenants were not people who were likely to have had a second home. Certainly a recipient of housing benefit should not have one.

33. In *Williams v Horsham District* Council [2004] EWCA Civ 39, to which both parties referred, the Court of Appeal said that "a person's main residence will generally be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as that person's home." To my mind that is what a reasonable onlooker would conclude about all three men living at the property.

34. Mr Sandham refers to the often-quoted remark of Lord Nicholls of Birkenhead in *Re H (Minors) (Sexual Abuse: Standard of proof)* [1996] AC 563, at 586C-H, that the more serious the allegation, the less likely it is that it occurred and the stronger the evidence will need to be to prove it. It is well-established that that remark does not change the standard of proof. The dictum is particularly inapposite here; the management of unlicensed HMOs is not on a par (in terms of seriousness) with the kind of allegation considered in *Re H*; on the other hand, the evidence that it was being committed in this case was strong. It is highly likely that persons who rent a room in such a house live there as their only or main residence.

35. The appellant's representatives have made some interesting submissions about the purpose of the criminal standard of proof and the experience in Scotland under similar legislation. I am grateful, but I do not think that analysis is needed here. There was strong evidence from which it can be inferred that the appellant, Mr Neville and Eddie lived at the property as their home, that is, as their only residence. In the unlikely event that they had somewhere else to stay, nevertheless the property was their main residence. I find that the FTT's failure to find that element of the offence proved beyond reasonable doubt was irrational.

The unlawful eviction

36. As to the eviction, the appellant points out that the FTT has not made any finding as to how the tenancy ended if it was not by eviction; that the FTT gave insufficient weight to his evidence that the key did not work in the lock, that the lock looked different, and that

he found his belongings "scattered throughout the house". I have not been able to find in his witness statements any reference to the lock looking different nor to his belongings being "scattered", but Mr Sandham in his written representations for the respondent does not suggest that that evidence was not given, and I take it that it was given in cross-examination.

37. The appellant goes on to say that the proposition that the door was stuck with paint was speculation and was not put to him in cross-examination. He did not break back into the room or employ a locksmith because he did not know that he was entitled to do so. Nor did the FTT give proper weight to the fact that the respondent lied in her application to be entered on the Electoral Roll.

38. Mr Sandham in his written submissions says that the appellant is arguing: "that once the Ft-T found that A had a tenancy, there ought to have been a presumption that his departure was unlawful and it was incumbent on R to either rebut that presumption by establishing (a) the tenancy was ended lawfully, or justify his departure by reference [to] a defence that (b) R reasonably believed that A had ceased to reside there."

39. I note that that was how the FTT described the appellant's argument in its refusal of permission to appeal, and indeed parts of the appellant's grounds can be read as making that argument. I agree that there is no presumption that the appellant's departure was unlawful. But I read the appellant's ground of appeal as being that the FTT failed to take into account the evidence that he put forward of an eviction (under his heading "Relevant evidence has been ignored or given insufficient weight"), namely the fact that the door would not unlock and the removal of his belongings.

40. On the other hand, it would be the respondent to show that she has a defence in that she believed the appellant had ceased to live there. But she has not suggested that she changed the lock because she thought the appellant had left. She denied that the lock had been changed or that she had made the appellant leave; therefore the defence set out in section 1(2) of the Protection from Eviction Act 1977 does not arise.

41. Reverting to the evidence for the eviction, the idea that the door was stuck with fresh paint was (as the FTT said) simply a suggestion by counsel. It was not part of the respondent's case. It was not put to the appellant. Mr Ahearne, one of the decorators, made no suggestion in his witness statement for the respondent that the door had been painted and might have stuck for that reason.

42. Mr Sandham says that "A asserted, without any supporting evidence, that his lock had been changed" and that the FTT noted that the evidence for that was that "he put his key in the lock and the door would not open". He points out that there was no photograph of the door and no evidence from a locksmith. He says that "A's possession had been carefully placed in bags within the property and his clothes hung up" and that therefore it was entirely plausible that the painters did it.

43. The supporting evidence for the assertion that the lock had been changed was that the key did not work and that Appellant could not get in. That he did not take a photograph or call

a locksmith is unsurprising. It is not in dispute that some of the appellant's belongings were in bags and the respondent said in her witness statement said that the appellant had packed his things up himself because the decorators were going in. The proposition that they were placed there "carefully" is speculation. There was no evidence from Mr Ahearne that he or any other decorator packed the bags. Indeed, far from that being an "entirely plausible" competing explanation, it is unlikely that the decorators would have interfered with a resident's belongings, and it would have been unlawful for them to do so.

44. The evidence points inexorably to the landlord having changed the locks and thrown the tenant's things out, some of them in bags. It is unrealistic and unnecessary to require further evidence to meet the criminal standard of proof. So far as this offence, too, is concerned the appeal succeeds.

Conclusion

45. The appeal succeeds. The appellant has proved to the criminal standard of proof that the two offences were committed, and therefore the condition precedent for the making of a rent repayment order is made out. The case is remitted to the FTT for it to determine whether to make such an order and for what amount.

46. I add a final observation. The FTT in its decision in this case was, I think, over-cautious about making inferences from evidence. For a matter to be proved to the criminal standard it must be proved "beyond reasonable doubt"; it does not have to be proved "beyond any doubt at all". At the start of a criminal trial the judge warns the jury not to speculate about evidence that they have not heard, but also tells them that it is permissible for them to draw inferences from the evidence that they accept. In this case there were obvious inferences to be drawn from the evidence, both about the eviction and about the circumstances of the other tenants. It may be that the FTT lost sight of those inferences and set the bar of proof too high. I say that in the hope that it is of assistance for the future.

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Judge Elizabeth Cooke

31 March 2020