UPPER TRIBUNAL (LANDS CHAMBER)

HA/14/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

BETWEEN:

AA HOMES & HOUSING LIMITED
& ANABOW SERVICES LIMITED

Appellants

and

THE LONDON BOROUGH OF CROYDON

Respondent

Upon hearing counsel for the appellants and for the respondent at the Royal Courts of Justice on 15 September 2019

IT IS ORDERED:

1. The appellants are refused permission to rely upon any of the additional grounds 1 – 6.

2. The appellants' application for the appeal to be determined by a re-hearing is refused.

Reasons

1. The appellants have permission to appeal the decision of the First-tier Tribunal ("the FTT") on their appeal from financial penalty notices imposed by the respondent under section 249A of the Housing Act 2004.

2. The background, briefly, is that on 13 April 2018 the respondent issued financial penalty notices to the appellants for managing (the first appellant) and having control of (the second appellant) Flat 39 at 5 Sydenham Road Croydon, CR0 2EX without a licence, as required by section 95 of the Housing Act 2004, from 7 September 2017 to 14 February 2018. The first appellant is the freehold owner of Flat 39 and of the block of which it forms part; the second appellant manages the block and arranges lettings. Section 95

required them to have a licence under a selective licensing scheme. It is not in dispute that there was a selective licensing scheme in force, under art 3 of the Housing Act 2004, at all material times.

3. The financial penalty notices followed notices of intention to impose a penalty, and opportunities for the appellants to make representations to the respondent, which they did.

4. The appellants appealed the penalties to the FTT, which heard the appeal on 3 September 2018 and gave its decision on 18 October 2018. At that hearing the appellants were represented by counsel; solicitors were acting for them, and a representative of the solicitors' firm was also present. The applicants offered no evidence. They accepted that they were guilty of the offence under section 95; their counsel cross-examined the respondent's witnesses; he argued not about whether an offence had been committed but about the level of the penalty imposed.

5. The FTT reduced the penalty imposed upon the first appellant from £26,000 to £20,000 and upheld the penalty of £12,000 imposed upon the second appellant. In considering the level of penalty it regarded as material the length of time for which the property had been unlicensed, the fact that the appellants owned other properties that had been unlicensed during 2017, and the level of fire hazards at the property. It granted the appellants permission to appeal, giving four reasons as follows:

    a. It is arguable that the tribunal, in coming to its conclusions, wrongly gave (undue) weight to the issue of the fire risk at the building.

    b. It is arguable that the tribunal took account of irrelevant matters or failed to give due weight to other evidence before it.

    c. It is arguable that the tribunal erred in not applying its reasoning in respect of AA Homes, the first Applicant, to the Financial Penalty imposed in respect of Anabow, the Second Applicant.

    d. This is a relatively new jurisdiction for the tribunal. There may be a wider public interest in the Upper Tribunal considering the tribunal's approach to Financial Penalties in these circumstances.

6. I take it that the first three reasons are grounds of appeal whereas point (d) gives a further reason for the grant of permission on those grounds (in addition to their being arguable). The appellants did not seek, and were not granted, permission to appeal the finding that they had committed an offence; the appeal related solely to mitigation.

7. Proceedings commenced in the Upper Tribunal and it was directed that the appeal would proceed as a review of the decision of the FTT. The appellants instructed fresh legal representatives. On 18 April 2019 they applied for permission to appeal on six additional grounds, as follows:

    1) The FTT's findings of fact were incorrect and based on evidence that was fundamentally flawed.

2) Flat 39 did not require a licence.

3) The licence application fee was not properly demanded by the authority.

4) The Appellants have a statutory defence under s.95(3): there was an outstanding application for a licence for Flat 39 from 12 September 2017.

5) The Appellants have a statutory defence under s.95(4): if they did fail to licence Flat 39, they have a reasonable excuse.

6) Mitigation: the authority's approach to the imposition of financial penalties was unlawful.

8. The appellants also applied for the appeal to be by way of re-hearing.

9. I heard the applications at the Royal Courts of Justice on 24 September 2019. The appellants were represented by Mr Jonathan Manning and Ms Vivienne Sedgley, both of counsel, and the respondent by Mr Paul Sharkey of counsel; I am grateful to them all for their helpful arguments.

The additional grounds of appeal

10. Some of the additional grounds seek to re-open – or, rather, to open for the first time – the question whether the appellants committed the section 95 offence. Ground 6 relates to mitigation, as does ground 1 in part, and some of the material relied upon in support of grounds 2 to 5 is also relevant to mitigation of the penalty. I observe that of the existing grounds of appeal, ground (b) in particular is open-textured and does not appear to limit the range of arguments that can be advanced in mitigation with a view to reducing the penalties. However, ground (b) does not enable the appellants to refer to evidence that was not before the FTT, at least not on a review of the FTT's decision; to raise fresh material they require permission to adduce new evidence, and they would need a re-hearing.

11. Along with its application the appellants served witness statements upon which they wish to rely in support of the new grounds. There are statements from Dr Ansari (who made two statements), Ms Sabeen Ansari, Mr Karl Oram, Mr Jeremy Lea, and Ms Darta Viksna, all of whom are witnesses of fact, and an expert witness' report from Mr Andrew Fox.

12. The hearing proceeded on the basis that the appellants apply to admit new evidence as well as to be allowed to rely upon additional grounds of appeal, and on the basis that that new evidence might be admitted either in support of the existing grounds or in support of the new grounds if any are allowed.

13. I turn to the additional grounds in order.

Ground 1: that the FTT's findings of fact were incorrect and based on evidence which was fundamentally flawed.

14. This ground relates to three aspects of the evidence before the FTT.

The fire safety evidence

15. First, the fire safety evidence. The appellants wish to show that the FTT was given inaccurate evidence about the safety of the premises, by two members of the London Fire Brigade who inspected it on 13 September 2017. Some of the new evidence sought to be adduced is given by witnesses of fact, namely Dr Ansari, Mr Oram and Ms Viksna, the first two of whom attended the hearing before the FTT. The appellants also seek to adduce the evidence of an expert witness, Mr Andrew Fox FFireE, MIAAI, MSET, QTLS, of CS Todd & Associates. He inspected the building on 12 April 2019.

16. The first of the existing grounds of appeal relates to the fire safety evidence. It is that the FTT "wrongly gave (undue) weight to the issue of fire risk at the building". Before the FTT it was argued that the level of fire hazards at the building was not relevant to the imposition of a financial penalty for failure to hold a licence; instead, it was said, there are other procedures for enforcing fire safety and other penalties for failure to do so. The FTT took the contrary view but granted permission to appeal on this ground.

17. What the appellants now seek to do is to say that even if, contrary to what they say about ground a), the issue of fire safety was relevant to the decision about the level of financial penalty, in fact the evidence given to the FTT was incorrect. The fire hazards were minor and the London Fire Brigade misunderstood regulations and current standards.

18. For the respondent it is said that the admission of new evidence on appeal 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".

19. Mr Sharkey submitted that the new evidence falls at the first hurdle; although there was some cross-examination of the Fire Brigade witnesses, there was no attempt to produce any evidence to controvert theirs, and the appellants could easily have done so.

20. Mr Manning concedes that the fire safety evidence could have been produced before the FTT. His arguments for the admission of the new evidence are as follows:

    1) First, he explains that the failure to adduce the evidence to the FTT was the result of legal advice received at the time. Counsel for the appellants at the FTT argued that the fire safety issues were irrelevant and for that reason advised the appellants not to adduce evidence about it. Mr Manning asserted that an oral application was made to the FTT to exclude the evidence but because no proper application had been made beforehand on notice the FTT refused it.

2) Second, he observes that this is a criminal matter and that if the appellants had been convicted in the magistrates' court they would have been entitled to a re-hearing in the Crown Court with no restriction on the adducing of new evidence.

3) Third, he says that *Ladd v Marshall* is not a decision about specialist tribunals, which can be more flexible in the way they admit evidence. He cites the decision of the Upper Tribunal in *Davis v Wiggett* [2016] UKUT358 (TCC), where new evidence was allowed to be adduced in a land registration case.

4) Fourth, and in support of the point above, he says that the evidence of the Fire Brigade changed at the hearing; one of the witnesses referred to the fire hazards as "10 out of 10" in terms of seriousness. That new evidence, he says, justifies the admission of evidence in response.

21. Looking at that last point first, I have to say that I regard it with considerable scepticism. The only "change" in evidence appears to be the "10 out of 10" description – hardly a precise term – and counsel for the appellants was able to offer argument to the FTT about it. In particular, he made the point that if the hazards were so serious it was surprising that the building was not shut down and that no further action was taken by the Fire Brigade for some weeks. Mr Manning conceded that the Fire Brigade witnesses did not offer new evidence about breaches of fire safety standards that had not been mentioned before. In reality there were no surprises in the evidence about fire hazards before the FTT. The appellants had proper notice of it. They chose not to contradict it, with the benefit of legal advice.

22. It is true that if this were an appeal in the Crown Court from the magistrates, there would be a re-hearing as of right and no restriction on new evidence. But it is not. Parliament has chosen to allow the imposition of civil penalties for this offence and to have the penalties appealed in civil proceedings. There is no reason why the criteria set out in *Ladd v Marshall* should not carry their usual weight. The idea that they are inapplicable in specialist tribunals is a novel suggestion and not, I think, sustainable; and if it is argued that they should be disregarded, or applied differently, because these are quasi-criminal proceedings, I do not agree. There are obvious benefits to the appellants in these being civil, and not criminal, proceedings; the other side of that coin is that the appellants are subject to the (very few) evidential constraints of civil proceedings.

23. I agree that the criteria in *Ladd v Marshall* are not absolute rules and must give way to the interests of justice, but this case is not on all fours, nor even close, to *Davis v Wiggett* . In that case I refused to allow the admission of new evidence that Mr Davis could have produced to the FTT, on the basis of *Ladd v Marshall,* save for one category of evidence which he could have produced but did not because he had no reason to suppose it would be relevant. He asked to produce it in response to evidence that Mr Wiggett had given to the FTT that was not in his witness statement and was not foreshadowed in his statement of case. That is not the case here. The evidence of the Members of the Fire Brigade was properly served beforehand and came as no surprise. The appellants' decision not to adduce evidence about fire safety, nor to apply before the hearing to have the respondent's evidence about fire safety excluded, is difficult to understand, but it was made with the

benefit of legal advice. Accordingly the fact that the evidence about fire safety could easily have been adduced to the FTT is an important consideration.

24. So too is the credibility of the evidence sought to be adduced. Mr Fox inspected the property more than 18 months after the fire officers inspected it. His evidence is candid as to what he cannot say, and I make no criticism of him at all; but what he can say is very limited and is about relevant standards at the time rather than about the actual condition of the property.

25. If the Tribunal were to admit fresh evidence about fire safety at this late stage, the appellants would be having a second bite of a cherry that they had ample opportunity to eat before the FTT. To admit this evidence would be unfair; it would be inconsistent with the approach taken to fresh evidence on appeal adopted by the courts and tribunals, since it falls foul of the *Ladd v Marshall* criteria; and it is contrary to the interests of justice since it would involve the reception of Mr Fox's evidence which, for reasons that are not Mr Fox's fault, is necessarily limited and of poor quality.

26. Accordingly I will not admit the fresh evidence about fire safety.

27. Second, Mr Manning seeks to adduce evidence about the eventual grant of licences for flat 39 and other flats in the building in September 2018, between the date of the hearing in the FTT and the date of the FTT's decision.

28. It is not in dispute that these licences were issued, although their significance is. Accordingly there is no need for the appellants to have permission to give evidence that the licences were granted.

29. Mr Manning initially sought to rely upon the grant of the licence for flat 39 as a statutory defence to the section 95 offence, pursuant to section 95(3); however, he accepted that that is not possible. The offence was committed from 7 September, the application was made on 12th September 2019, and the licence was granted for a period beginning on 12 September 2019. There is therefore no statutory defence.

30. There is no difficulty, of course, in Mr Mannings arguing for the appellants under existing ground (b) that the eventual issuing of the licence with effect from 12 September 2018 meant that the original application was valid and that this and other flats were not in fact unlicensed for anywhere near as long as the FTT said they were. There is considerable dispute as to the validity of the application made on 12th September, and if that application – and the eventual licence granted – are sought to be relied upon in mitigation under existing ground (b) then there will no doubt be argument about that.

31. Some of the evidence in the witness statements now sought to be adduced relates to the difficulty the appellants had in completing the on-line application for the licence. Again, this could easily have been given to the FTT and have been of central relevance to the mitigation that was being argued to the FTT. I have already discussed the criteria in *Ladd v Marshall;* again, this evidence falls at the first hurdle and will not now be admitted.

Evidence that Flat 39 was not let to Mr Watson

32. The appellants also seek to admit evidence that Flat 39 was not let as a dwelling and therefore did not require a licence at the date of the offence.

33. Section 85 of the Housing Act 2004 requires every house to which Part 3 of that Act applies to be licensed, with some exceptions that are not relevant to this case. Section 95 makes it an offence to have control of management of such a house without a licence. Section 79(2) says that Part 3 applies to a house if:

> "(a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and
>
> (b) the whole of it is occupied either—
>
> (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or
>
> (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence …"

34. Section 99 says that in Part 3:

> " "dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling;
>
> "house" means a building or part of a building consisting of one or more dwellings."

35. On 7th September 2017 the respondent wrote the appellants and to all their tenants at 5 Sydenham Road requesting access on 13 September 2019, following a priority referral by the London Fire Brigade about the safety of the block on 5 September.

36. On 12 September 2017 the first appellant applied for a licence for flat 39. On the application form, in answer to the question "What tenure is the property?" the first appellant answered "Leasehold". The first appellant also stated on the form "The current tenant is the first tenant I have rented the property to". I note that these were standard answers chosen from a range of options and are not the first appellant's own words, but this is how it chose to answer those questions. In answer to "when did the tenancy start" it gave the answer 9th September 2017. It answered "yes" to "Are the tenants provided with written details of the terms of their tenancy".

37. On 13 September the respondent visited the block; Flat 39 was occupied by Mr Watson, who filled in and signed a form on which he said that he was the tenant of Flat 39, that his tenancy began on 1 April 2017, and that he paid £900 per month.

38. On 25 October 2017 the respondent wrote to the appellants with a notice under section 235 of the Act asking for documentation including any licence or tenancy agreement. In response on 10 November 2017 the appellants provided a copy of an assured shorthold

tenancy for Flat 39 in which the tenant's name is given as Mr Ralph Watson, the tenancy is said to start on 1 April 2017 and the rent is given as £900 per month. The agreement is signed by Mr Watson and dated 1 April 2017 but is not executed by the company.

39. The appellants now seek to adduce evidence that Flat 39 was not let to Mr Watson and therefore does not fall within the terms of section 85 because it is not a house to which Part 3 applies. They say that the flat was not let out to anyone but was used as a "crash pad" for their employees from time to time. Dr Ansari says in his witness statement that Mr Watson was an independent contractor working for the appellants on a sporadic basis; and that he recalls being shown the assured shorthold tenancy and refused to sign it, and that the draft stayed on file which is why it was produced to the respondent. Mr Oram gives evidence that he stayed in Flat 39 now and then, as does Mr Lea.

40. This evidence could all have been offered to the respondent in response to notices of intention to impose a financial penalty, and could all have been produced to the FTT. It is not possible to understand why, if it is true, it was not. Again, it falls at the first of the *Ladd v Marshall* fences. It also falls at the third because, being in contradiction to the appellants' position in 2017 (in the application for a licence, and in their production of the tenancy agreement on request without any suggestion that it was not effective), it is not credible.

41. Accordingly permission to appeal on ground 1 of the additional grounds is refused, since none of the evidence put forward in support of it is admitted.

Ground 2: Flat 39 did not require a licence.

42. Ground 2 is relied upon as a defence; the appellants say that they did not need a licence for Flat 39 and therefore did not commit the offence under section 95 of the Housing Act 2004. Ground 2 has two limbs.

43. Ground 2.1 is that Flat 39 did not require a licence because it was not occupied as a separate dwelling by Mr Watson. This is not arguable because I have refused to admit the evidence that Mr Watson was not a tenant.

44. Ground 2.2 is a new point of law, that it was not open to the respondent to require a licence for an individual flat.

45. Mr Manning took me to section 85, which requires "a house" to which Part 3 applies to be licensed, and then to section 79 which specifies the houses to which the Part 3 applies, namely houses occupied under a single tenancy or licence or under two or more tenancies or licences in respect of different dwellings in it. Section 99 defines a house as a building or part of a building. These provisions are set out above at paragraphs 33 and 34.

46. Mr Manning argued that it was Parliament's intention to require the licencing of houses, rather than of individual flats within a block. He concedes that a single flat in a block or in a house might require a licence if it was not held in common ownership with the rest of the building; he says that if two or more persons each owned and let out several of the flats in a block and if they were contiguous so as to form "part of a building" then they should be

licensed under one licence; but that where, as in this case, a landlord owns all the flats in a block then that block is the "house" and the local authority may not require a licence for each flat. That was Parliament's intention, argues Mr Manning; and if it were not, how could the common parts be licensed?

47. I am unable to understand this argument as a matter of statutory construction. A flat is a "part of a building" (section 99). If it is the subject of a tenancy agreement, as this one was, it is a house to which Part 3 applies (section 79). It is clearly possible for the building, instead, to be licensed, on the basis that it is let on two or more tenancies in respect of separate dwellings; but the fact that it is possible for the local authority to issue a licence for the whole block does not mean that it is not permissible for it to licence individual flats. If Parliament had intended the construction for which Mr Manning argues it wold have had to say so.

48. I regard this ground of appeal as unarguable; it has no chance of success on appeal.

49. Permission to appeal on ground 2 is refused.

Ground 3: the licence application fee was not properly demanded by the respondent

50. Ground 3 relates to the fee charged for the licence.

51. On 12 September 2017 the first appellant paid £350 on the basis that the tenancy had only just started and therefore they were entitled to pay a lower fee. In pMarch 2018 the first appellant paid the additional £400 to make up the £750 fee. One of the reasons it is said that the application on 12 March 2017 was not valid was that the incorrect fee had been paid.

52. Three arguments are made in support of ground 3. One is that it was unlawful for the respondent to charge an "upfront" fee whether of £350 or £750, following the decision in *R(Gaskin) v London Borough of Richmond* [2018] EWHC 1996. It is said that the fee cannot possibly represent only the cost of processing and determining the application.

53. No evidence is offered in support of this assertion. It appears to be speculative. I fail to see how it helps the appellants. It is not said that the entire licensing scheme was unlawful, only that the fee was unlawful in terms of its amount. That is a matter for judicial review. It is not a defence to the offence that the appellants have admitted, nor does it have any bearing on the appellants' own conduct so as to go to mitigation. That may be why counsel for the appellants before the FTT confirmed that he was aware of the decision in *Gaskin* and did not seek to rely on it.

54. Second, it is said that because the respondent was entitled only to licence the whole building and not to require a licence for individual flats, the appellants had overpaid (having by then paid a fee for more than one flat). As already discussed, this argument is untenable.

55. Third, it is said that even if the £350 was insufficient, the respondent was already retaining some £4,000 in overpaid fees from the Appellants, which it could and should have

allocated to any insufficient fee for Flat 39. I asked at the hearing to be shown the evidence for this, and was pointed to records of refunds of overpaid fees made in 2019; for the most part it was not clear when the overpayments had been made. Even if there is supporting evidence, it does not seem to me to be arguable that, on receipt of an inadequate fee, the respondent should have hunted around for amounts the appellants had overpaid and allocate them to this licence. It is difficult to see how it could properly have done so.

56. There is no prospect of success on ground 3 and permission is refused.

Ground 4: a statutory defence under section 95(3)

57. Ground 4 is that the appellants had a statutory defence under section 95(3) of the Housing Act 2004 by virtue of the outstanding application. As I said at paragraph 29 above, at the hearing Mr Manning accepted that the application could not amount to a defence, although it was relevant to mitigation. Accordingly this ground is not arguable and permission to rely upon it is refused.

Ground 5: a statutory defence under section 95(4)

58. Ground 5 is that the appellants have a statutory defence under section 95(4), that if they did fail to get a licence for Flat 39 they have a reasonable excuse because they reasonably believed that none was required, because the flat was not let to Mr Watson, because of the illegality of the fee scheme, and because of the respondent's retention of £4,000.

59. There is no evidence that the appellants believed any of these things during the time that the flat was unlicensed, and the evidence available points to their having known that a licence was needed – hence their application on 12 September.

60. In particular, as I noted above, the evidence of the letting to Mr Watson came from the appellants themselves in the form of their application on 12 September and of their production of the assured shorthold tenancy; they clearly did not believe that the flat was not let to Mr Watson and for that reason this ground is not arguable. They have changed their minds since, but I have refused permission to adduce evidence that Mr Watson was not a tenant, and accordingly for that reason too this ground is not arguable and permission to rely upon it is refused.

Ground 6: the respondent's approach to the imposition of financial penalties was unlawful

61. Finally, ground 6 relates only to mitigation. Mr Manning seeks to be able to argue that the FTT was wrong in its approach to the totality principle (being one of the steps in the calculation of the penalty) because that principle required that the two appellants, being controlled by the same director and shareholder, should not each be penalised. He also wishes to argue additional mitigation on the basis of the alleged shortcomings in the fire safety evidence, the duration of the offence, the nature of Mr Watson's occupation, and the position as regards the licensing of other flats in the block. Finally he seeks to argue that

the level of financial penalty imposed should reflect the available fine in the Magistrates' Court.

62. These are all matters of mitigation which seem to me to fall squarely within existing ground (b). Clearly it is not open to Mr Manning to seek to mitigate the penalty on the basis that Mr Watson was not a tenant, since the evidence to that effect is not admitted. Nor can he argue that the appellants "genuinely believed" that no licence was required for Flat 39, when there is no evidence to that effect.

63. But insofar as the material already before the Tribunal supports them, arguments in mitigation can be raised under ground (b) without the need for an additional ground of appeal; and Mr Sharkey helpfully agreed that that was the case. Accordingly the application to admit this additional ground is refused because the appellants in substance already have permission on this ground.

The application for a re-hearing

64. I have refused permission for the appellants to rely upon any of their six additional grounds of appeal, and I have not given permission for them to rely on any new evidence. Accordingly there is no reason for the appeal to proceed by way of re-hearing and it will remain a review of the decision of the First-tier Tribunal.

65. I have asked counsel for the parties to seek to agree directions for the hearing of the appeal.

Elizabeth Cooke
Upper Tribunal Judge

26 September 2019