UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 0039 (LC)

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – CIVIL PENALTY ORDER – RENT REPAYMENT ORDER – burden of proof – whether reliable or fair to determine contested facts to the criminal standard of proof without a hearing – appeals allowed

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
HOUSING ACT 2004
THREE APPEALS AGAINST DECISIONS
OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

UTLC Case Number: HA/14/2020

BETWEEN:

MR SALEEM RAZA **Appellant**

and

BRADFORD METROPOLITAN DISTRICT COUNCIL **Respondent**

Re: 41 Hampden Place,
Bradford,
BD5 OJF

UTLC Case Number: LC-2020-23

BETWEEN:

(1) MR SHALIM AHMED
(2) MR ANTONIO AHMED **Appellants**

and

MR TAYLOR RYAN **Respondent**

Re: 22 Park View Court,
Bath Street,
Nottingham,
NG1 1DD

UTLC Case Number: LC-2020-27

BETWEEN:

MR GUY RENDALL **Appellant**

and

MS GABRIELLE VELA **Respondent**

Re: 157 Murray Road,
Rugby,
Warks,
CV21 3JR

Judge Elizabeth Cooke
Determination on written representations

The following case is referred to in this decision:

Enterprise Home Developments LLP v Adam [2020] UKUT 151 (LC)

Introduction

1. This is the Tribunal's decision in three appeals from decisions of the First-tier Tribunal ("the FTT"). Each of the three appeals is brought by a landlord following a determination on the papers, without a hearing. Two of the appeals are from rent repayment orders made by the FTT under section 40 of the Housing and Planning Act 2016; the other is from the FTT's decision on an appeal against a financial penalty imposed by the local housing authority under section 249A of the Housing Act 2004. What the three appeals have in common is that in order to make each decision the FTT had to be satisfied to the criminal standard of proof that an offence had been committed; in each case permission has been granted on the ground that the FTT's procedure was unfair because it made that finding without a hearing where matters of fact were in dispute.

2. In none of the three cases was a hearing dispensed with because of the pandemic. The FTT has conducted video hearings since the lockdown that began in March 2020; in the first of the three appeals the paper determination was made before the lockdown while hearings were still being conducted in person, and in the two later cases there would have been no difficulty in conducting oral hearings by remote video platform. So these are not cases where a procedure was adopted in response to the difficulties arising from the pandemic.

3. The three appeals have been determined under the Tribunal's written representations procedure because they are reviews of the FTT's decision and do not involve hearing evidence. None of the parties had legal representation.

4. In the paragraphs that follow I explain the legal background to the appeals; I then give some brief factual background to each appeal and the proceedings in the FTT, and then I discuss the ground of appeal. In giving the factual background I say no more than is necessary to understand the appeal, and of course I have heard no evidence and make no findings of fact.

The legal background to the appeals

5. All three appeals arise from the legal regulation of houses in multiple occupation under the Housing Act 2004 and the Housing and Planning Act 2016 ("the 2004 Act" and "the 2016 Act"). As is well-known, houses in multiple occupation ("HMOs") are defined in the 2004 Act; many of them, but not all, are required to be licensed by the local housing authority.

6. The 2004 Act creates a number of criminal offences. Among them are the offence of managing or being in control of an HMO that is required to be licensed while it is not so licensed (section 72(1) of the 2004 Act); a defence of reasonable excuse is provided in section 72(5). The offence ceases to be committed once a valid application for a licence has been made (section 95(3)).

7. It is also an offence to fail to comply with the regulations that set out the duties of the manager of an HMO to take safety measures (section 234 of the 2004 Act; the regulations

are the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ("the HMO management regulations")).

8. The commission of a housing offence may give rise to prosecution. Instead or as well it may give rise to the imposition of a financial penalty order by the local housing authority, and in the case of some offences to the making of a rent repayment order in favour of the relevant tenants.

9. Civil penalties can be imposed under section 249A of the 2004 Act which provides:

> "(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
>
> (2) In this section "relevant housing offence" means an offence under—
>
> (a) section 30 (failure to comply with improvement notice),
>
> (b) section 72 (licensing of HMOs),
>
> (c) section 95 (licensing of houses under Part 3),
>
> (d) section 139(7) (failure to comply with overcrowding notice), or
>
> (e) section 234 (management regulations in respect of HMOs)."

10. Rent repayment orders were introduced by the 2016 Act, of which section 43(1) provides:

> "(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted)."

11. The offences referred to are set out in section 40 of the 2016 Act; they include the offence under section 72 of the 2004 Act but not the offence under section 234 of that Act.

12. Financial penalties are imposed by the local authority and there is an appeal to the FTT, which must conduct a re-hearing (paragraph 10 of Schedule 13A to the 2004 Act); in contrast, rent repayment orders are made by the FTT. The FTT cannot confirm a financial penalty, or make a rent repayment order, unless it is satisfied beyond reasonable doubt that the relevant offence has been committed (section 249A(1) of the 2004 Act, above, applies equally to the FTT on a re-hearing; and section 43(1) of the 2016 Act, above, sets out the requirement in the case of rent repayment orders).

13. Proof "beyond reasonable doubt" is the criminal standard of proof; contrast the civil standard where the court or tribunal must be satisfied on the balance of probabilities.

Mr Raza's appeal

14. Mr Raza is the freehold owner of 41 Hampden Place, Bradford. It is not in dispute that it is an HMO. Following inspections of the property in June 2018 the respondent local housing authority identified what it regarded as a number of serious fire and other hazards at the property. In September 2018 Mr Raza was cautioned and interviewed by the respondent pursuant to the Police and Criminal Evidence Act 1984 Code of Conduct in relation to his alleged breach of the HMO management regulations. On 14 November 2018 the respondent decided to impose a financial penalty on Mr Raza for that breach. It served the relevant notices and on 11 March 2019 imposed a penalty of £25,000.

15. Mr Raza appealed to the FTT. In his application form Mr Raza indicated that he was content for the appeal to be determined without a hearing. In fact a hearing was listed to take place on 25 February 2020 but at the respondent's request it was adjourned and a paper determination was made instead. Before making that adjournment the case officer at the FTT telephoned Mr Raza to check that he was content with that procedure and he said he was.

16. The FTT then considered the written evidence of Mr Raza and for the respondent. Mr Raza did not agree that he had committed an offence under section 234 of the 2004 Act. He sought to blame one of the tenants for the state of the property, and he did not agree with the evidence of the respondent's housing officer.

17. The FTT in its decision of 13 March 2020 declared that it was satisfied beyond reasonable doubt that Mr Raza had committed the section 234 offence and proceeded to assess the amount of the penalty. It confirmed the penalty at £25,000.

18. Mr Raza in his grounds of appeal maintains his challenge to the respondent's evidence and disagrees with the housing officer's assessment of the state of the property; he says there should have been an inspection by the FTT; he seeks to challenge the level of the financial penalty; and he complains that the hearing was vacated without his consent. He has permission to appeal only on the ground that there should have been an oral hearing.

19. The respondent in written submissions to the Tribunal has explained why it requested a paper determination, namely for the sake of the safety of one of its witnesses who had, they say, been threatened by one of Mr Raza's tenants and they were worried that the tenant might attend the hearing either as a witness or as a member of the public.

Shalim and Antonio Ahmed's appeal

20. Mr Shalim Ahmed and Mr Antonio Ahmed are the freeholders of 22 Park View Court, Nottingham. They granted an assured shorthold tenancy of part of the house to the respondent, Mr Ryan, in March 2019. I have no information about the occupation of the rest of the house but it is not in dispute that from at least the start of Mr Ryan's tenancy

until 25 June 2020 the house was an HMO that was required to be licensed and was not licensed.

21. Mr Ryan applied to the FTT on 21 June 2020 for a rent repayment order; he sought repayment of 12 months' rent, at £400 per month. The FTT directed that the parties file statements of case and that the application would be determined without a hearing unless either party objected, and neither did.

22. The landlords' evidence was that they had applied for a licence as soon as the local authority brought to their attention the need for a licence in a notice dated 23 May 2019, but were unable to complete their application because the website kept crashing; they said they contacted the local authority for help on numerous occasions but got nowhere. The local authority's notice dated 25 June 2020 of its intention to grant a licence acknowledged receipt of a valid application on 28 April 2020. The landlords' case was that they had applied long before then, and that if their earlier application was not valid they had the defence of reasonable excuse because the local authority's website made it impossible to apply.

23. The FTT was not impressed by the landlords' account of their efforts to apply for licence. It took the view that the landlords had initially had a defence of reasonable excuse because they were unaware of the need to get a licence, but found that the offence was committed from 2 June 2019 (being the expiry of the time given to them by the local authority to apply for a licence in the notice of 23 May 2019) until 28 April 2020. The FTT therefore made a rent repayment order representing rent paid during that period in the sum of £4,340.00.

24. The two landlords seek to challenge the findings of fact made by the FTT, and therefore its conclusion that the offence was committed. Prior to 28 April 2020, they say, they had the defence of reasonable excuse because of their persistent attempts to apply for a licence. Permission to appeal has been given on the sole basis that the FTT's decision might be set aside because it was made on the papers without a hearing.

25. The respondent in his Grounds of Opposition points out that the appellants were content to have a paper determination and did not raise that as an issue with the FTT; they also say that the outcome would have been the same even with a hearing because the FTT gave careful consideration to the appellants' evidence and found that it was not credible.

Mr Rendell's appeal

26. Mr Rendell is the freehold owner of 157 Murray Road, Rugby; the FTT found that he had been the landlord "at all material times". He bought it to let out, to supplement his pension, and it has 6 bedrooms over three floors which the landlord sought to let out separately with shared facilities.

27. Mr Rendell applied for an HMO licence on 14 May 2019 and a licence was issued to him on 21 June 2019.

28. The respondent, Ms Gabrielle Vela, took an assured shorthold tenancy of the attic bedroom in the house on 7 July 2018 and left on 7 June 2019. She applied to the FTT on 6 May 2020 for a rent repayment order on the basis that the house was unlicensed throughout the period of her occupation. The FTT gave directions on 7 May 2020 that the application would be determined on the papers unless either party requested a hearing. There was no request for a hearing.

29. There were two respondents in the FTT: Mr Rendell himself as the freeholder and Newman Property Services Limited ("Newman Property") as his agent who managed the house for him and arranged lettings, was appointed by Mr Rendell as his agent in February 2018. Newman Property submitted a bundle to the FTT and appears to have represented both respondents; Mr Rendell did not provide a witness statement.

30. The FTT found, on the basis of the number of rooms available for letting, that at all material times the property was an HMO requiring a licence. Nothing was said by the FTT in its decision about the level of occupancy of the house during Ms Vela's tenancy.

31. The FTT found, from the documentation supplied in Newman Property's bundle, that on 28 February 2018 Mr Rendell obtained from the local authority a Completion Certificate, certifying that the works described in it were in compliance with building regulations; the works described were the conversion of the property to an HMO. The FTT also found that Newman Property was instructed in February 2018 to let the 6 rooms, at £100 a week; that they discussed the need for an HMO licence with Mr Rendell; that he produced to them the building control completion certificate and suggested to them that it was a licence to let the property as an HMO and they accepted it as such.

32. The FTT considered whether the landlord might have the defence of reasonable excuse to the section 72 offence, by virtue of the building control certificate, but it found that no-one could reasonably have supposed that that was an HMO licence.

33. The FTT declared that it was satisfied beyond reasonable doubt that Mr Rendell had committed the offence of managing or being in control of the property without an HMO licence when one was required, for the period from 7 July 2018 to 14 May 2019 when the application was made. It then went on to consider the appropriate level of rent repayment order, and made an order that Mr Rendell pay £4,102.09.

34. Mr Rendell's grounds of appeal were presented to the FTT in a letter headed "Notice of Appeal – Statement of Financial Hardship" and the FTT said in its refusal of permission that concluded from the heading of the letter that the ground of appeal was financial hardship. However, the letter raises a number of matters. Mr Rendell says that while he was having the property renovated in early 2018 he made several enquiries of the local authority and was told by a number of different officers that the building regulations certificate and other certifications relating to fire safety etc were all that he needed to operate an HMO. He says that for only one month of the period covered by the rent repayment order was the property occupied by five or more people because he had not been able to let it out fully. He explains the financial hardship that the order will cause him. The FTT in its refusal of permission to appeal was unpersuaded by the evidence of

financial hardship, and also said that it did not accept that Mr Rendell had been misled by employees of the local authority.

35. Ms Vela in a letter to the Tribunal in response to Mr Rendell's application for permission to appeal raises some safety issues, and asserts that a landlord is required to have an HMO licence "even if they intend of having 5 or more residents", which may perhaps lend some support to Mr Rendell's point that the property was not fully occupied during the relevant period. The Tribunal granted permission to appeal on the basis that it was arguable that the FTT should have conducted a hearing, and on the basis that if the appeal was successful the other issues raised would then be considered by the FTT at a re-hearing.

The appeal

36. In each case the FTT made a decision without a hearing, and the parties made no objection to that.

37. All three appellants have been granted permission to appeal on the basis that it is arguable that there should have been a hearing, and the respondents no doubt feel aggrieved about that in view of the appellants' consent to the procedure at the time. Only Mr Raza has argued in his ground of appeal that there should have been a hearing, and the Tribunal has taken the point on its own initiative for the other appellants.

38. The FTT is responsible for the fairness of its procedure. Litigants may well consent to a procedure without understanding the implications of doing so, and it may be unfair to hold them to that agreement.

39. *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC) is a case which, as the Deputy President put it in paragraph 1,

> "… illustrates the perils of determining disputed issues of fact on the basis of written material provided by unrepresented parties, without either the parties or the tribunal having the opportunity to supplement that material by asking and answering questions at an oral hearing."

40. The decision points out that even where the parties have indicated that a paper determination is acceptable it is nevertheless for the FTT to consider whether that is an appropriate procedure. At paragraph 36 the Deputy President observed:

> "I do not consider it can safely be assumed by the FTT that an unrepresented party will necessarily appreciate the material which ought to be provided in even a simple case."

41. The decision in *Enterprise Homes* was made on 12 May 2020, after the FTT's decision on 13 March 2020 in Mr Raza's case but before the decisions in the other two appeals (both of which were made on 23 September 2020, by different panels).

42. The difficulty with the procedure adopted by the FTT in these three cases was that these landlords were at risk of being found to have committed a criminal offence, there were factual issues in dispute, and the FTT made findings of fact on the basis of evidence that had not been tested in cross-examination. That made the procedure unreliable. It was also unfair because it resulted in a finding that a criminal offence had been committed without giving the landlord the opportunity to cross-examine the witnesses who gave evidence against him or to respond, under cross-examination, to the case against him.

43. There might perhaps be cases where written evidence about disputed facts was sufficiently clear and consistent for a tribunal to make findings of fact on the balance of probabilities. But it is difficult to imagine cases where the FTT could be so sure of contested facts, on the basis of written evidence only, that it could find them proved to the criminal standard, beyond reasonable doubt. And even if the FTT could be sure, it would nevertheless be unfair, for the reasons explained, in a case where the party concerned was at risk of being found to have committed a criminal offence.

44. In Mr Raza's appeal the respondent has explained why it wanted a paper determination; the explanation given does not negate the necessity for Mr Raza to have a fair hearing. The FTT was well able to take appropriate measures for the protection of the respondent's witness, using procedures with which the courts and tribunals are familiar.

45. In the appeal by Mr Shalim Ahmed and Mr Antonio Ahmed the respondent argues that the outcome would have been no different had there been a hearing. That cannot be known; it simply amounts to an assumption that the FTT's conclusion on the paper determination was correct. If the matter is remitted to the FTT and the same conclusion is eventually reached following an oral hearing, that will not mean that the appeal should have failed; it will mean that a result has been reached following a reliable and fair process.

46. I have had some hesitation in Mr Rendell's case since he did not make a witness statement to the FTT. It is not clear, from the FTT's very brief account, how much information it was given by the managing agents. If there had been a hearing where he was represented by Newman Property, it would not now be open to Mr Rendell to put forward new material. But had there been a hearing, attended only by a representative of Newman Property, the FTT would have had the opportunity to ask questions, and it might well have realised that the defence of reasonable excuse might be available and could have given directions for more evidence to be filed (in fairness to unrepresented parties). It would surely have asked questions to satisfy itself about the occupation of the house during the period in question; it made no findings about that and it does not appear that the point was addressed in the material before the FTT. Overall, the procedure was not reliable and was not fair to Mr Rendell.

47. Accordingly all three decisions are set aside.

Conclusion

48. All three appeals succeed.

49. Each case is remitted to the FTT to be determined following a re-hearing (whether in person or by remote video platform), and each re-hearing should be conducted by a different panel from that which made the paper determination. For the avoidance of doubt I point out that the decisions are set aside in their entirety, so that if the new panel decides that the offence was committed, it must make its own decision about the appropriate level of penalty or rent repayment order.

Judge Elizabeth Cooke

17 February 2021