UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 047 (LC)
UTLC Case Number: LC-2021-566

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – time limit for service of a notice of intent by the local housing authority – what is "sufficient evidence" in paragraph 2(2) of Schedule 13A to the Housing Act 2004

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

BETWEEN:

MR RICARDO PINTO

Appellant

-and-

WELWYN HATFIELD BOROUGH COUNCIL

Respondent

Re: 10 Fern Dells,
Hatfield,
Hertfordshire,
AL10 9HX

Judge Elizabeth Cooke

Determination on written representations

Mr Michael Field for the appellant, instructed by Freemans Solicitors.

Introduction

1. This is Mr Pinto's appeal from a decision of the First-tier Tribunal ("the FTT") about a financial penalty imposed upon him by the local housing authority, Welwyn Hatfield Borough Council, for the offence of managing or being in control of a house in multiple occupation ("an HMO") which was required to be licensed and was not, contrary to section 72(1) of the Housing Act 2004. Mr Pinto appeals with permission of the FTT. Essentially he says that the local housing authority left it too late to impose the penalty.

2. The appeal has been conducted under the Tribunal's written representations procedure. Mr Pinto's grounds of appeal were drafted by Mr Michael Field of counsel. The local housing authority has chosen not to participate in the appeal.

The factual and legal background

3. Mr Pinto's property 10 Fern Dells, Hatfield, was let to four tenants by an agreement dated 1 December 2019. There is no appeal from the FTT's finding that from 10 April 2020 to 4 May 2020 the property was required to have an HMO licence. Nor is there any appeal from the FTT's decision that Mr Pinto did not have a reasonable excuse for not licensing the property and that he therefore committed the section 72(1) offence during that period.

4. A landlord may of course be prosecuted for that offence. Section 249A of the Housing Act 2004 enables a local authority instead to impose a financial penalty, up to a maximum of £30,000. Section 249A(1) 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."

5. The relevant offences are listed in section 249A(2) and include the section 72(1) offence.

6. Schedule 13A to the Housing Act 2004 sets out the procedure for the imposition of a financial penalty by the local housing authority, as follows:

> "1. Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").
>
> 2(1)The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates….
>
> 3 The notice of intent must set out—
>
> (a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

4(1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

5 After the end of the period for representations the local housing authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty."

7. The final notice must set out the amount of the penalty and require payment within 28 days.

8. Paragraph 2(2) of Schedule 13A, above, imposes a time limit; the local housing authority must give the notice of intent within six months of the date when it "has sufficient evidence of the conduct to which the financial penalty relates."

9. In the present appeal the notice of intent was served on 1 December 2020. Mr Pinto made written representations, and the final notice was issued on 24 February 2021, imposing a financial penalty of £5,000. Mr Pinto appealed to the FTT pursuant to paragraph 10 of Schedule 13A. The FTT was required to make its own decision rather than to review the local housing authority's decision; it found, as I noted above, that the offence had been committed and imposed a penalty of £2,500.

10. One of Mr Pinto's arguments before the FTT was that the notice of intent was served too late, because the local housing authority had the "sufficient evidence" required by paragraph 2(2) of Schedule 13A before 1 June 2020. The FTT at its paragraph 2.4 set out the words of paragraph 2(2) and said this:

> "We understand the phrase, "sufficient evidence of the conduct to which the financial penalty relates," to mean for the purposes of the time limit: sufficient evidence to justify the issuing of a penalty pursuant to s. 249A of the Act and, accordingly, that the evidence must be such as to satisfy the authority, "beyond reasonable doubt", that the person's conduct amounted to a relevant offence. In other words, the authority was required to be sure that the offence was being or had been committed."

11. It went on to find that the local authority did not have sufficient evidence before 27 June 2020, and that therefore the notice of intent was given in time. Mr Pinto appeals first on the basis that the FTT's interpretation of paragraph 2(2) was wrong and, second, that the FTT's finding as to when the local housing authority had "sufficient evidence" was incorrect.

The first ground of appeal

12. Mr Pinto argues that the six month period referred to in paragraph 2(2) of Schedule 13A is not evidence that proves the offence to the criminal standard, beyond reasonable doubt.

13. He argues that the FTT's interpretation conflated the standard of proof required for the local authority or the FTT itself to be satisfied that an offence has been committed, with the standard of proof necessary to issue a notice of intent. The words "beyond reasonable doubt", he says, or "sure", are conspicuous by their absence in paragraph 2 of Schedule 13A. What is required is simply "sufficient evidence", which is a lower standard of proof, because the notice of intent is not a decision but simply a statement of intention. The statute enables the landlord then to make written representations; if the offence was already proved beyond reasonable doubt, Mr Pinto asks, what would be the point of those representations? They are invited, he says, so as to enable the local housing authority to make its judgment; only when it is then satisfied beyond reasonable doubt is the requirement of section 249A(1) satisfied so that the final notice can be issued.

14. In my judgment the FTT was right. Section 249A and Schedule 13A together provide that the local housing authority may impose a financial penalty if it is satisfied beyond reasonable doubt that the offence has been committed, and that in order to do so it must within 6 months of having sufficient evidence serve a notice of intent. The words "sufficient evidence", read in context, must mean "sufficient evidence to impose a financial penalty" – which in the light of section 249A must mean evidence that proves the offence beyond reasonable doubt. If the words mean only "sufficient evidence to serve a notice of intent" then it is not possible to know what would be sufficient; and if such an unspecified lower standard of proof were intended then a local housing authority would have to guess the point from which time runs.

15. That interpretation is consistent with a fair process. Once the local housing authority has sufficient evidence to prove the offence beyond reasonable doubt, then it ought to get on with the process, and waiting for more than six months after that point would be unfair to the offender. On the other hand it would be unfair to the local authority to put it under time pressure to serve a notice of intent while the evidence is such that it cannot be sure that the offence has been committed. As to the landlord's opportunity to make written representations, the point of those is obviously to enable the landlord's point of view to be considered, first because he has a right to be heard and importantly because his evidence might put things in a different light and change the authority's mind.

16. I would add one proviso to my agreement with the FTT. Paragraph 2(2) does not say the local housing authority must actually be sure. It says only that there must be sufficient evidence for it to be sure. So I disagree with the final sentence of the FTT's paragraph 2.4. That means that if there is an abundance of evidence, the six month period starts to run even if the local authority's officers do not direct their attention to that evidence.

17. But aside from that proviso, I agree with the FTT; "sufficient evidence" in paragraph 2(2) of Schedule 13A is evidence sufficient to prove the commission of the offence to the criminal standard.

The second ground of appeal

18. The second ground of appeal is that in fact the local authority had sufficient evidence some weeks before 1 June 2020 so that the notice of intent, served on 1 December 2020, was out of time. This ground is a challenge to a finding of fact. The FTT saw and heard the witnesses and the Tribunal will interfere with its findings of fact only if irrationality or an error of law can be shown.

19. So we now have to turn in more detail to the facts of the case.

20. I have referred above to the tenancy agreement of December 2019, made between Mr Pinto and four tenants. The FTT recorded that there was some conflicting evidence as to whether all four of those tenants lived there after December 2019, but said at its paragraph 3.5.2 that it was satisfied that after 4 May 2020 there were four people living there so that the addition of one or more persons would have brought the property – agreed to be an HMO – into the licensing requirements imposed by the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 (the FTT referred to the 2006 Order but the 2018 Order is the relevant one).

21. The FTT also found that on 10 April 2020 Mr Pinto had allowed an individual called Ely or Eli to live there under a "lodger's licence" and, at paragraph 3.5.3, that it was likely or possible that a Ms Kirilova went into occupation with him. On 4 May 2020 Ely and one or more other people were removed from the property by Mr Pinto. The FTT's decision is not very specific about names but the evidence given for the local housing authority makes it clear that the people removed were a Mr Nikolay Pavlov and a Ms Kirilova Nadezhda; it may be that "Ely" was Mr Pavlov.

22. Accordingly there were five or more people living at the property between 10 April and 4 May 2020 and the property required an HMO licence for that period. There is no appeal from those factual findings.

23. So when did the local housing authority have "sufficient evidence" to impose a financial penalty and therefore to serve a notice of intent?

24. Evidence for the local housing authority was given to the FTT by its employee Ms Emillia Musk, a Private Sector Housing Technician. In her witness statement she explained that she was contacted by a colleague about a possible illegal eviction at the property on 4 May 2020. She emailed Mr Pinto on 5 May and he replied with a copy of the tenancy agreement, her exhibit EMU 3, which she regarded as documentary evidence that at least five people had been occupying the property; I take it that she meant that there were four tenants and, as far as she knew at the time, at least one person who had been removed from it.

25. Ms Musk went on to say that on 16 May 2020 she received an HMO declaration form (exhibit EMU 4) filled in by one of the tenants, Mr Da Silva, which stated that four people now occupied the property. On 12 May 2020 she received an email from Mr Pinto (exhibit EMU 5) which referred to other people having recently lived at the property. On 13th May she received a witness statement from a Mr Bozhkov (EMU 6) who had assisted a Mr Pavlov, who had been allowed into the property by Mr Pinto and had made a payment to him; there was a photograph of Mr Pinto receiving the money (EMU 7). On the same date she received a statement from Mr Pavlov describing his time at the property. On 28th May she and a colleague interviewed Mr Pavlov and Ms Nadezhda "about their experiences at the property" and had the interview transcribed (EMU 9).

26. Ms Musk then invited Mr Pinto to attend a PACE interview. He declined to attend. On 27 June 2020 PC Aaron Taylor emailed to the local housing authority his witness statement, made after he attended the eviction on 4 May 2020, which confirmed that Mr Pavlov and Ms Nadezdha were living at the property. The FTT said in its decision that a hard copy of the statement was received on 29 June 2020; Ms Musk does not say that in her witness statement and I take it that that point came out at the hearing.

27. The notice of intent stated that the local housing authority had sufficient evidence on 29 June 2020.

28. The FTT observed that section 249A of the Housing Act 2004 required the local housing authority to be satisfied to the criminal standard before it could impose a financial penalty. It was therefore "correct and proper" to invite Mr Pinto for an interview. Because that interview did not take place it was appropriate for the local housing authority to wait for corroboration from PC Taylor before being satisfied that an offence had been committed. Time had not started to run against the local housing authority before it had that evidence and the notice of intent was served in time.

29. Mr Pinto in his grounds of appeal relies upon paragraph 26 of Ms Musk's statement which said this:

> "'On about 29th June 2020 we became satisfied that an offence had been committed on or about the 10th April 2020 to the 4th May 2020. We became satisfied an offence had been committed from the documentary evidence I received mentioned above. In particular, EMU/03, EMU/04, EMU/05, EMU/06, EMU/07, EMU/09. The tenancy agreement which showed four people living in the property during the dates mentioned above, coupled with the lodger's agreement, and the photo of Mr Pinto holding money, **prove to us, beyond reasonable doubt**, that there were five tenants paying rent on the property and five or more tenants residing in the property. The statements and transcribe meeting from Nokolay, Illya and Nadezhda also prove to us that Nokolay did have an agreement with Mr Pinto to reside in the property.' (emphasis added)

30. EMU 9, it will be recalled, was the interview with Mr Pavlov and Ms Nadezhda, which took place on 28 May 2020, and the other exhibits listed came to her attention on earlier dates. Accordingly, says Mr Pinto, Ms Musk's own evidence was that there was sufficient evidence

by 28 May 2020; she says herself that the evidence received by that date proved the matter beyond reasonable doubt.

31. I take the view that the FTT correctly made a decision about when there was, objectively, sufficient evidence. The recollection of an officer of the local authority is unlikely to be able to pin down the precise date when she, or a colleague, or a team, became sure that an offence had been committed, as we can see from the fact that Ms Musk's paragraph 26 is imprecise (giving both 29 June 2020 as the point of satisfaction and the receipt of the documents EMU 3 to EMU9). And the statute does not require subjective evidence of a state of mind. The FTT looked, correctly, at the evidence itself and decided when there was sufficient evidence. I see no flaw in its reasoning that, in the absence of an interview with Mr Pinto himself, matters went beyond reasonable doubt when PC Taylor's evidence was received.

32. Mr Pinto argues that PC Taylor's evidence added nothing; it did not corroborate anything because he took his information from the same individuals whom Ms Musk had interviewed. But PC Taylor had seen Mr Pavlov and Ms Nadezhda on 4 May 2020 at a point when they claimed to have just been evicted, rather than three weeks later, and so would have given information about what was said on that day to have occurred on that day. So PC Taylor's evidence had obvious significance.

33. Accordingly the appeal fails on both grounds.

Upper Tribunal Judge Elizabeth Cooke

21 February 2022

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.