Neutral Citation Number: [2023] UKUT 289 (LC)

UTLC Case Number: LC-2023-250

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT ref: LON/00BH/HMG/2022/0001

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER - service of proceedings – whether the FTT is entitled to use an email address supplied by the tenant and taken from an expired tenancy agreement as the address for service of proceedings – case management – whether hearing should have been adjourned

BETWEEN:

MR KWASI DATE-BAH (1)
MS LISA DATE-BAH (2)

Appellants

-and-

MS RACHEL RADICE

Respondent

Re: 83 Coopers Lane,
London,
E10 5DG

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations
Decision Date: 4 December 2023

Mr M Mukulu for the appellants
Kaushalya Balaindra of Safer Renting for the respondent

The following cases are referred to in this decision:

Acheampong v Roman and others [2022] UKUT 239 (LC)

Ladd v Marsahll [1954] EWCA Civ 1

1.

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") to make a rent repayment order against the appellants, Mr and Mrs Date-Bah. They received just two working days' notice of the hearing of the application made by the respondent Ms Radice, their former tenant; they have permission to appeal the FTT's refusal to adjourn the hearing.

2. Permission to appeal has been granted by this Tribunal on the ground that the hearing should have been adjourned. The appeal has been determined under the Tribunal's written representations procedure. Written representations were filed for the appellants by Mr M Mukulu of counsel, and for the respondent by Kaushalya Balainder of Safer Renting. To avoid confusion, since the appellants were the respondents in the FTT, I refer to the parties by name throughout.

The factual and legal background

3. Mr and Mrs Date-Bah are the registered proprietors of 83 Coopers Lane, London E10. In September 2019 they granted an assured shorthold tenancy for a term of 24 months to Ms Radice and her then partner Mr Butler, commencing on 20 October 2019. The agreement allowed the tenant to give two months' notice of termination of the agreement during the term at any time from 12 months after its commencement. Mr Butler in May 2021 and Ms Radice gave notice in June so that the tenancy came to an end on 19 August 2021.

4. The property is in the borough of Waltham Forest, and the Waltham Forest Borough Council operates a selective licensing scheme under Part 3 of the Housing Act 2004 so that while the property was let to tenants it was required to be licensed. Section 95(1) of the 2004 Act provides that it is an offence to be in control of or to manage a house that is required to be licensed under such a scheme and is not licensed. The property did have such a licence until 30 March 2020. Mr and Mrs Date-Bah applied for a new licence on 18 June 2021; once an application for a licence has been made there is no offence committed. They do not deny that they were managing the unlicensed house for that 15-month period and they have not suggested that they have a defence to the section 95(1) offence.

5. The section 95(1) offence is one of those listed in section 40 of the Housing and Planning Act 2016, so that a tenant who has been living in an unlicensed house can apply for a rent repayment order. Ms Radice did so in December 2021. She provided the FTT with Mr and Mrs Date-Bah's email address as stated in the tenancy agreement and with their postal address. The FTT served documents on them by email.

6. On Thursday 9 June 2021 Mr and Mrs Date-Bah received by post notice of the hearing of the Ms Radice's application on Monday 13 June 2021. Mrs Date-Bah telephoned the FTT and followed that up with emails explaining that this was the first they had heard of the proceedings because they no longer used the email address in the tenancy agreement, that they did not have time to prepare for the hearing, that Mrs Date-Bah had flu-like symptoms and had a doctor's appointment on the Monday, and that they had no childcare that day (their daughter was then two years old). Mrs Date-Bah requested an adjournment.

7. The request and emails were referred to a judge; the FTT in paragraph 4 of its substantive decision gave the following reasons for its decision to refuse an adjournment on 9 June 2022:

> "The Tribunal papers had been sent to the Respondents' correct email address which was set out on the Applicant's tenancy agreement for use in connection with the tenancy. None of the correspondence or documents sent by the Tribunal had bounced back, they had therefore reached a valid, working email address. It is the Respondents' responsibility to check email addresses which they own and it had been their choice not to do so. Their failure to receive the papers timeously cannot be blamed on the Tribunal or on the electronic server. Further, the Respondent had not produced any evidence to support her claim to have a medical appointment on 13 June and the Judge directed that the Tribunal would have no objection to the Respondents' child being present at the hearing."

8. Mr and Mrs Date-Bah secured representation by Mr Mukulu of counsel and Mrs Date-Bah attended the video hearing. Mr Mukulu applied for an adjournment on the grounds that his clients had had insufficient notice of the hearing and had not been able to prepare for it or to file evidence. The panel retired to consider the application and recorded in its decision that "the application was refused on essentially the same grounds as before."

9. The FTT went on to hear the application. It recorded in its decision that "Mr Mukulu was unable to present evidence on behalf of his own clients because they had failed to comply with any of the Tribunal's Directions and no documents had been filed on their behalf."

10. The FTT in its decision set out the evidence relating to the occupation of the property and the licensing requirement. It stated that Mr and Mrs Date-Bah admitted that they had not had a licence during the period in question; how that admission was made is not stated, beyond a reference to a page in the hearing bundle. It expressed itself satisfied to the criminal standard of proof that Mr and Mrs Date-Bah had committed the offence created by section 95(1) of the 2004 Act. It decided that it was appropriate to make a rent repayment order and went on to consider the quantum of the order. It stated that Mr and Mrs Date-Bah were professional landlords, but did not say why it reached that conclusion. It set out evidence from the tenant and concluded that the property was inadequately maintained so far as gas, electricity and hot water were concerned. It noted that it had no details of Mr ad Mrs Date-Bah's financial circumstances. And it said at its paragraph 28:

> "In these circumstances where a professional landlord has not produced any evidence to justify their defence or to validate expenditure on the property the Tribunal is reluctant to deduct any sums from the amounts claimed by the Applicant."

11. It therefore made a rent repayment order in the full amount claimed by Ms Radice, £9,750.

The appeal

12. The appeal is not against the service of documents by email. But it is worth setting out the FTT's rule about service, in rule 16 of the FTT's 2013 rules:

> "(1) Any document to be provided under these Rules, a practice direction or a direction must be—
> (a) sent by prepaid post or by document exchange, or delivered by hand to the address specified in paragraph (5);
> (b) sent by fax to the number specified for the proceedings;
> (c) as regards any document sent or delivered to or by the Tribunal, by such other method as the Tribunal may permit; or
> (d) as regards any document to be sent or delivered by a method other than one provided for by sub-paragraphs (a), (b) or (c) or another paragraph in this rule, by such other method as the recipient may permit.
> …
> (7) Subject to paragraph (8), if a party provides a fax number, email address or other details for the electronic transmission of documents to them, that party must accept delivery of documents by that method.
> (8) If a party informs the Tribunal and all other parties that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to provide documents to that party, that form of communication must not be used.

13. The tenancy agreement gave the landlords' email address for service of notices. Ms Radice made her application to the Tribunal in December 2021, and the agreement expired in August 2021. The relevant clause of the tenancy agreement stated:

> "The Landlord and the Tenant agree that notice may be served on the other party by email. The email addresses for notice are: Landlord: [xxx@xxx]"

14. I have deleted the actual email address; it was admittedly Mr and Mrs Date-Bah's email address, and although they did not check it after Ms Radice left the property it remained a live email address after that and emails did not bounce back. Ms Radice provided the FTT with Mr and Mrs Date-Bah's email and postal addresses, and the FTT was entitled to use the email address.

15. Nor is it an appeal from the refusal to adjourn on Thursday 9 June 2022 in response to Mrs Date-Bah's telephone call and emails. But it is important to note, since the FTT adopted the same reasoning in its refusal to adjourn on the day of the hearing, that in refusing an adjournment on that date the FTT did not suggest that Mrs Date-Bah was not telling the truth about not having had notice of the proceedings. It appears that the FTT accepted what she said but regarded the problem as her own fault. The FTT was sceptical about the doctor's appointment, but did not give Mrs Date-Bah the opportunity to produce evidence about it (which was unlikely to have been available to Mrs Date-Bah when she wrote the email if, for example, she had made the appointment by telephone). As for the suggestion that Mr and Mrs Date-Bah could attend the hearing with their child, it is difficult not to regard that as unrealistic, and certainly inconsistent with the advice given to litigants attending remote hearings who are asked to be in a quiet place free of distractions.

16. As I said above, Mr and Mrs Date-Bah have permission to appeal the FTT's decision on the grounds that the FTT erred in not adjourning the hearing on 13 June 2022, and that the hearing was therefore procedurally unfair.

17. The decision not to adjourn was a case-management decision, in the discretion of the FTT, and the Tribunal will only interfere with it if the decision was outside the generous margin of discretion. If the decision lay within the range of permissible decisions then it must stand, even if I would have made a different decision.

The arguments in the appeal

18. Mr and Mrs Date-Bah say that they were not given a fair hearing. There was insufficient time to give full instructions to Mr Mukulu and to produce evidence which would have been relevant, if not to the making of a rent repayment order at least to its quantum, because it related to the safety of the gas system which was a matter the FTT took into account in fixing the amount of the penalty. They also argue that the FTT should not have used the email address from an expired tenancy agreement.

19. They have also applied for permission to adduce fresh evidence on appeal, and have supplied material relevant to the safety and maintenance of the premises.

20. In response it is argued for Ms Radice that service by email was correct (but that is not in issue), and that new evidence should not be admitted because the criteria in *Ladd v Marsahll* [1954] EWCA Civ 1; the evidence could easily have been provided to the FTT had Mr and Mrs Date-Bah monitored their email address. In any event Ms Radice disputes the relevance of the material provided.

Discussion and conclusion

21. It is worth reiterating that I see no difficulty in the use by the FTT of the email address provided by Mr and Mrs Date-Bah in the tenancy agreement. The tenancy agreement was not long expired. The email was intended for use in connection with the tenancy.

22. It is also worth reiterating that the FTT did not suggest that it disbelieved Mr and Mrs Date-Bah when they said that they had not received notice of the proceedings or any materials until 9 June 2022. Had the FTT doubted the truth of that, it would no doubt have invited Mrs Date-Bah to give evidence at the hearing about whether she and her husband had checked the email. But it did not do so and appears to have taken what Mr and Mrs Date-Bah said as being true. Nor has Ms Radice suggested that they were lying.

23. The issue is whether, in light of that, in deciding not to adjourn on 13 June 2022 the FTT exceeded the generous range of discretionary decisions open to it.

24. Had Mrs Date-Bah not attended on 13 June the FTT would have had to consider whether to go ahead in her absence. Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:

> "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

25. Rule 34(a) would have been satisfied in light of Mrs Date-Bah's email on 9 June 2022, but consideration would also have had to be given to rule 34(b), in light of the fact that the proceedings required the FTT to consider whether a criminal offence had been committed ad to determine contested issues of fact. In circumstances where no-one was doubting that Mrs Date-Bah was telling the truth when she said she had known nothing about the proceedings until 9th June it is doubtful that it would have been in the interests of justice to proceed.

26. Suppose further that the letter arrived not on 9th June but on 14th. It is unlikely that in those circumstances the FTT would have gone ahead on 13th June in the absence of any indication that any information that the proceedings had actually reached Mrs Date-Bah; but if they had done so, then when Mrs Date-Bah received the letter on 14th June the FTT would have had to consider what to do in light of rule 51, which says:

> "(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
> (a) the Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
> (2) The conditions are—
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
> (b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
> (c) **a party, or a party's representative, was not present at a hearing related to the proceedings;** or
> (d) there has been some other procedural irregularity in the proceedings.
> (emphasis added)

27. In that hypothetical situation the FTT would have had to consider whether it was in the interests of justice to set aside its decision in circumstances where it had found Mr and Mrs Date-Bah to have been guilty of a criminal offence in their absence, and had resolved contested issues of fact against them in their absence.

28. As it was, the FTT went ahead. It gave no detailed reasons for doing so, instead referring to its decision on 9 June 2023 (see paragraph 7 above) which was itself brief, sceptical in its response to the information about the doctor's appointment, and unrealistic in its suggestion that Mrs Date-Bah might attend the hearing with her child. No consideration appears to have been given as to whether Mrs Date-Bah's actions in securing representation at the last minute and managing the difficulties of childcare and the doctor's appointment might make a difference.

29. The consequences of the decision not to adjourn were very serious for Mr and Mrs Date-Bah. For one thing, Mrs Date-Bah was not allowed to give evidence. That must have been very frustrating for Mrs Date-Bah, but it was an inevitable consequence of the decision not to adjourn; the FTT in the course of a hearing will not allow a party, in this case Ms Radice, to be taken by surprise by evidence of which they have had no notice. But of course the fact that a refusal to adjourn meant that a case involving contested evidence of

fact was going to be decided without hearing evidence from Mr and Mrs Date-Bah, for whom the consequences of an adverse finding would be extremely damaging, was a factor that the FTT should have taken into account in making its decision not to adjourn, and the FTT gave no reasons why it was content to go ahead in those circumstances.

30. As to the evidence itself, it is not clear how the FTT concluded that Mr and Mrs Date-Bah admitted managing the property without a licence; the FTT referred to a page in the bundle for that, and of course Mr and Mrs Date-Bah had not seen and had no input into the bundle. That said, their grounds of appeal make clear that they do not dispute that point. As to the quantum of the order, however, there is serious dispute. There is no indication of the basis on which the FTT found Mr and Mrs Date-Bah to be professional landlords and they had no opportunity to answer the suggestion that they were. They had no opportunity to give evidence about the state of the property, nor about their financial circumstances. True, they were represented and had the opportunity to challenge Ms Radice's evidence, but they had had no time to give proper instructions to Mr Mukulu and there were limits to what cross-examination could achieve in the absence of their own evidence.

31. Moreover, the FTT in considering the basis of the penalty gave no consideration to the seriousness of the offence, nor to the guidance given by the Tribunal in cases such as *Acheampong v Roman and others* [2022] UKUT 239 (LC) and simply moved straight to the conclusion that the whole of the amount claimed should be repaid, apparently on the basis that Mr and Mrs Date-Bah's failure to serve evidence justified that approach (see paragraph 10 above). I fail to see how that could possibly be either legally correct or fair.

32. In light of those consequences the refusal to adjourn the hearing on 13 June 2022 was unfair to Mr and Mrs Date-Bah, as was the rent repayment order made by the FTT as a result of that hearing, and the FTT's decision is therefore set aside.

33. I have given no consideration to the application to adduce evidence on appeal. The appeal has been by way of review of the FTT's decision, and evidence which was not before the FTT is not relevant to the appeal. When the FTT gives directions for a re-determination it will make provision for both parties to file evidence in the usual way.

Conclusion

34. The appeal succeeds. The FTT's decision on the quantum of the rent repayment order is set aside, and the matter is remitted to the FTT for a fresh determination, by a different panel, or the amount to be paid. Either party may ask the FTT for directions so that the matter can be re-determined.

Judge Elizabeth Cooke

4 December 2023

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.