UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RENT DETERMINATION – assured periodic tenancy – whether agreement provided for contractual rent review and so precluded reference of proposed new rent to tribunal – whether mere statement of tenants' rights – ss 13-14, Housing Act 1988 – appeal dismissed

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

BETWEEN:

(1) MR PRAVIN CHOUHAN
(2) MISS ANGELA THOMAS

Appellants

and

THE EARLS HIGH SCHOOL

Respondent

Re: 2 School House
The Earls High School
Halesowen
West Midlands BS63 3SL

Decision following written representations

The following cases are referred to in this decision:

Helena Partnerships Ltd v Brown [2015] UKUT 0324 (LC)

Contour Homes Limited v Rowen [2007] EWCA Civ 842

Introduction

1. Sections 13 and 14 of the Housing Act 1988 are concerned with increases in rent payable under assured periodic tenancies. Where the landlord under such a tenancy wishes to obtain an increased rent it must serve on the tenant a notice in a prescribed form specifying the proposed new rent to take effect at the beginning of a specified period of the tenancy (section 13(1)-(2)). The proposed rent will take effect unless the parties agree an alternative figure or the tenant exercises the right conferred by section 13(4) to refer the notice to the first-tier tribunal ("FTT"). The task of the FTT under section 14 of the Act is then to determine the rent which might reasonably be expected to be obtained if the property were let under an assured tenancy on the open market (section 14(1)).

2. Section 13(1) defines the tenancies to which this statutory scheme of rent review applies. It provides as follows:

> 13. Increases of rent under assured periodic tenancies.
>
> (1) This section applies to –
>
> (a) A statutory periodic tenancy other than one which, by virtue of paragraph 11 or paragraph 12 in Part 1 of Schedule 1 to this Act, cannot for the time being be an assured tenancy; and
>
> (b) Any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period.

3. Section 13(1)(a) is concerned with statutory periodic tenancies i.e. any assured tenancy under the 1988 Act which is a fixed term tenancy but which has come to an end leaving the tenant in possession by virtue of section 5 of the Act (section 5(7)). The effect of section 13(1)(a) is therefore that, with certain irrelevant exceptions, section 13 applies to all statutory periodic tenancies.

4. Section 13(1)(b) applies the statutory procedure for increasing rent to every other periodic tenancy which is an assured tenancy, with the important exception contained in section 13(1)(b) which is the subject of this appeal. It provides that the statutory procedure for varying the rent payable under an assured tenancy is not available if the tenancy includes a binding provision "under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period."

5. In *Helena Partnerships Ltd v Brown* [2015] UKUT 0324 (LC) at paragraph 25 the Tribunal referred to the leading decision of the Court of Appeal on this provision and explained:

> "Section 13(1)(b) is intended to cover all contractual provisions for increasing rent, whether they be for fixed increases (for example by reference to the change in the retail price index, or

stepped increases to predetermined figures) or for increases by reference to an objective standard such as open market value. The scope of section 13(1)(b) was considered by the Court of Appeal in *Contour Homes Limited v Rowen [2007] EWCA Civ 842*, in which Arden LJ held that:

> "The exclusion in section 13(1)(b) of the 1988 Act applies not simply to cases where the amount of the increase in rent is set by the tenancy agreement but also in cases where the tenancy agreement merely provides a machinery for increasing the rent."

If there is contractual machinery for increasing the rent, the parties are not entitled to make use of the statutory provisions for determining an increase in sections 13 and 14."

The facts

6. Since March 1990 the first appellant, Mr Chouhan, has occupied part of a house (formerly used as the headmaster's house) in the grounds of The Earls High School, Halesowen. Miss Thomas, the second appellant has occupied the same premises with him since 1994. At the time the appellants' tenancy began their landlord was the local authority, Dudley Borough Council. A local authority cannot grant an assured tenancy (see Housing Act 1988, Schedule 1, paragraph 12) and the couple's tenancy, which was a weekly tenancy, was therefore a secure tenancy under section 80, Housing Act 1985 (the legislation governing local authority tenancies).

7. In 2002 the appellants and their landlord entered into a written form of tenancy agreement. The copy of the tenancy agreement which has been provided to the Tribunal is signed only by the tenants and not by Dudley Borough Council and the document is undated, but there is no suggestion that its terms are not binding on the appellants. The tenancy agreement is a strange document which was clearly drafted by someone who appreciated that because the landlord was a local authority the tenancy could not be an assured tenancy under the 1988 Act. Nevertheless in clause 2 of the agreement the tenancy was specifically described as an assured weekly tenancy. The rent was to be £395 pm (which I infer from other documents had been the rent originally agreed in 1990).

8. Provision was made in clause 3.2 of the tenancy agreement for the rent to be altered. Since the clause is central to this appeal I will set it out in full:

> "3.2 Changes in rent
>
> 3.2.1 The landlord may increase or decrease the Rent by serving notice on the Tenant which notice shall specify the proposed increase or decrease and the date on which it shall take effect which shall be a date not earlier than one calendar month after the date of the notice.
>
> 3.2.2 SUBJECT TO the provisions of clause 3.2.3 the amount of any increase in rent shall not be such as will increase the Rent above the level of rent which a Rent assessment committee would determine for the Premises if the Rent assessment committee had jurisdiction to determine the rent in accordance with the Housing Act 1988 section 14

and no such increase shall take effect within the 12 months following any previous increase.

3.2.3 At any time during the Tenancy the Landlord and the Tenant may agree that the Rent shall be increased in return for improvements to the Premises carried out by the Landlord and any such agreement shall specify the amount of the increase the date from which it shall take effect and the improvements to which it relates and any such increase shall not constitute an increase for the purpose of clause 3.2.2."

9. In November 2011 the freehold interest in School House was transferred to the Official Custodian of Charities and on 9 January 2012 the custodian granted a head lease of premises including School House to the respondent, the Earls High School, for a term of 125 years.

10. On 28 July 2015 agents acting for the school served a notice on the appellants in the form prescribed for notices proposing a new rent under assured periodic tenancies in England. The notice referred to section 13(2) of the 1988 Act and informed the appellants that the respondent proposed a new rent of £520 per month in place of the existing rent of £395 with effect from 6 October 2015. The guidance notes which are part of the prescribed form informed the appellants that if they did not accept the new proposed rent they were entitled to refer the notice to the FTT.

11. On 17 September 2015 the appellants referred the notice to the FTT.

The decision of the FTT

12. Having considered the terms of the tenancy agreement the FTT formed the preliminary view that it lacked jurisdiction to determine a rent for School House because it considered that the tenancy fell within the exception in section 13(1)(b) of the 1988 Act. After a hearing to determine the issue of jurisdiction the FTT issued a decision on 26 February 2016 in which it concluded that the tenancy was not an assured tenancy to which section 13 of the 1988 Act applied because it contained a contractual provision for varying the rent; accordingly the FTT held that it had no jurisdiction to consider the proposed rent increase.

13. With the permission of the Tribunal granted on 3 May 2016 the appellants now appeal against that decision which. With the consent of both parties I have determined the appeal on the basis of their most helpful written representations.

The appellants' submissions

14. The appellants' submissions to the FTT, settled by Mr Justin Bates of counsel acting through the Bar Pro Bono Unit, sought to persuade the tribunal that clause 3.2 of the tenancy agreement had the same effect as the clause considered by this Tribunal in *Helena*. In that case a registered social landlord's standard form of assured tenancy agreement was full of helpful information, including

information to the tenant explaining the manner in which the landlord could increase the rent. The relevant clause (which was not expressed as an agreement between the parties) was in the following terms:

> "… we [i.e. the landlord] can in accordance with sections 13 and 14 Housing Act 1988 increase your rent at any time if we give you at least one month's notice in writing of the increase. You must then pay the full amount shown in the notice unless either we and you agree to an alternative figure or you ask a rent assessment committee to set a rent for you. This rent will be the most we can charge for one year from the date specified in the notice unless you and we agree otherwise."

15. In *Helena* the Tribunal held that the clause was not a provision which engaged section 13(1)(b) of the 1988 Act. It was instead no more than information which had no independent effect. At paragraph 37 the Tribunal described the clause:

> "…as a simple statement of the effect of the general law under which, after the first year of the tenancy the appellant will have the right under sections 13 and 14 of the 1988 Act to increase the rent payable under the agreement. That statement has no independent contractual force. The parties clearly intended no more than that [the tenant] would have the right to refer a notice of increase given under section 13 to the appropriate tribunal as the general law entitles him to do. It follows that the appellant's entitlement to invoke the statutory rent review procedure does not convert that procedure into a contractual rent review clause with the perverse consequence that access to the statutory procedure is prohibited."

16. It was submitted on behalf of the appellants that clause 3.2 should be analysed in two parts. Clause 3.2.1 was no more than a statement of the landlord's entitlement to give a notice to increase or reduce the rent payable. The process envisaged reflected section 13(2) of the 1988 Act. Clause 3.2.2 then introduced a contractual restriction on the amount of the increase which the landlord was entitled to require but, the appellants submitted, that restriction did not prevent the landlord's notice under clause 3.2.1 from operating as a statutory notice proposing a new rent which could be referred to the appropriate tribunal under section 14.

17. The appellants explained the reference in clause 3.2.2 to the level of rent which a rent assessment committee would determine if it had jurisdiction to make a determination under section 14, simply as a reflection of the odd history of the agreement. At the time the tenancy was granted the tenancy was not an assured tenancy, because the landlord was a local authority, so that the rent assessment committee would not have had jurisdiction to determine a rent. (I should explain that the task of determining rents was previously performed by the rent assessment committee, but is now the job of the FTT).

18. In supplementary submissions in support of the appeal prepared by Mr Alexander Campbell of counsel, again acting through the Bar Pro Bono Unit, the appellants drew attention to the practical difficulty for them of challenging a notice of proposed increase given under clause 3.2.1 of the tenancy agreement if they could not refer the notice to the appropriate tribunal under section 14. The appellants' only remedy if they did not accept the proposed rent would be to ask the county court for

a declaration that the landlord's proposal exceeded the rent which would have been determined by a rent assessment committee under section 14 of the 1988 Act if it had jurisdiction. The appellants suggested that the county court was poorly equipped to make a determination of the level of rent which a specialist Tribunal would have considered appropriate. The appellants' argument amounted, essentially, to a suggestion that if clause 3.2 was properly regarded as a contractual rent review mechanism it must be treated as having broken down because of the practical and jurisdictional obstacles to the ascertainment of the rent which would have been determined by the appropriate tribunal under section 14.

Discussion

19. The F-tT did not accept the submissions made on behalf of the appellants, and nor do I.

20. Section 13(1)(b) excludes from the ambit of the statutory rent determination procedure any tenancy which contains a contractual rent review mechanism binding for the time being on the tenant. The practice of some registered social landlords of summarising the statutory rights of their tenants in their standard tenancy agreements, although useful as an aid to understanding, can create ambiguity, as the Tribunal's decision in *Helena* illustrates. But there is no such ambiguity in this case.

21. For reasons which are unclear (perhaps because School House may not have been part of the ordinary housing stock of Dudley Borough Council) the terms on which the premises were let sought to mimic the effect of the 1988 Act, even though the draftsman clearly appreciated that the tenancy could not be an assured tenancy. That appreciation is apparent not only from clause 3 but also from clause 6 which incorporates some of the grounds of possession found in schedule 2 of the 1988 Act and paragraph 6.4 which purports to confer a contractual right of succession under section 17 of the 1988 Act. Despite the fact that it was understood, at least by the draftsman, that the 1988 Act did not apply, and that the appellants had no statutory rights to rely on sections 13 and 14, an attempt was made to create the same or similar rights by agreement.

22. Unfortunately for the appellants, it is not possible for parties, by agreement, to confer jurisdiction on a court or statutory tribunal which Parliament has said is not to have jurisdiction in the circumstances of their case.

23. I am satisfied that clause 3.2 does not simply record statutory rights which apply in any event because of the nature of the tenancy (in the manner of the clause in *Helena*) but is a binding contractual agreement between the parties regulating the manner in which the rent may be varied. Because this tenancy could not be an assured tenancy at the time it was granted, the best the parties could do was to rely on the level of rent which would be determined under section 14 by the appropriate tribunal (if it had jurisdiction) as a contractual maximum which would limit the rent the landlord could propose under its notice of increase. It is also clear from clause 3.2.1 that the landlord's notice of increase was intended to be effective to change the rent, and was not to be capable of being referred to the appropriate tribunal under section 14. Clause 3.2.2 is correctly described by the appellants' counsel as a contractual limitation on the level of the increase which may be specified in the landlord's notice. Such a contractual limit was required because the parties clearly

intended the rent to remain at the level appropriate to an assured tenancy (despite the fact that this was not an assured tenancy) notwithstanding there being no right for the appellants to apply to the FTT under section 14.

24. The purpose of referring to section 14 in clause 3.2.2 was therefore that it should be used as a contractual yardstick to regulate the level of rent increases and to prevent the landlord from requiring an increase above the level of the rent which would be determined by a rent assessment committee (or now by the FTT) "if" that body had jurisdiction.

25. When the tenancy agreement was first granted the tenancy was a secure tenancy with a local authority landlord, so neither sections 13 and 14 nor any other part of the 1988 Act had any application to it. The landlord was free to specify such increase as it considered would leave the rent at or below the level which a rent assessment committee would determine if it had jurisdiction under section 14.

26. When the interest of the landlord was transferred to the Custodian of Charities in November 2011, and subsequently became vested in the School on the grant of the head lease in January 2012, the tenancy agreement ceased to be a secure tenancy and, for the first time, became an assured tenancy to which the provisions of the 1988 Act applied. Nevertheless, because clause 3.2 is a provision such as is described in section 13(1)(b) (i.e. a contractual provision under which the rent could be increased) section 13 still does not apply to the tenancy. The appellants therefore still have no right under section 13(4)(a) to refer the notice of increase to the appropriate tribunal.

27. As the FTT appreciated, the appellants are correct in their submission that the only way in which they could challenge the new rent specified in a notice of increase given by the school is in proceedings before the county court. Those proceedings might either take the form of an application by the tenants in their own right for a declaration that the rent specified in the notice given under clause 3.2.1 exceeds the rent which a rent assessment committee would determine for the premises if it had jurisdiction under section 14. Alternatively if they were faced with an increase which they believed was above the limit imposed by clause 3.2.2 the tenants could decline to pay that rent and instead either continue to pay at the previous rate or propose an alternative increase to the level they considered would be determined by the FTT under section 14. This would be a dangerous course, which might result in their eviction. Unless the landlord agreed to the tenants' proposal, it would be likely to begin proceedings to recover the arrears which would accumulate. In either case it would be for the county court to determine whether the landlord had exceeded its contractual right by specifying an increase which caused the rent to be at a level above that which would be determined by the appropriate tribunal under section 14. If the court concluded that the landlord's notice of increase was excessive it seems likely that the court would have no further part to play in the contractual scheme. The operative instrument for increasing the rent is the landlord's notice under clause 3.2.1 and, if a proposed increase is above the limit set by clause 3.2.2 it would be necessary for the landlord to give a further notice specifying a rent within that cap.

28. The assessment required under clause 3.2.2 of the agreement cannot seriously be suggested to be beyond the competence of a county court judge. The District and Circuit judges in the county

court deal with property, landlord and tenant and housing cases on a regular basis. All county court judges are FTT judges (sections 6 and 6(a), Tribunals, Courts and Enforcement Act 2007) and all FTT judges are now judges of the county court (section 5(2)(t) and (u) County Courts Act 1984, as amended by the Crime and Courts Act 2013). The suggestion, therefore, that the determination of a dispute over the level of rent specified in a landlord's notice under clause 3.2.1 is incapable of adjudication in the county court so that the contractual rent review mechanism must be regarded as having broken down, is simply untenable.

Conclusion

29. For these reasons the appeal must be dismissed and the F-tT's determination that it has no jurisdiction to consider the appellants' reference of the proposed rent increase is upheld.

30. I would add, however, that the terms of the parties' current agreement have clearly outlived their original purpose. Although it would be able to undertake the necessary assessment, the county court is clearly not as well-adapted to, or experienced in, the application of section 14 of the 1988 Act as the FTT. Neither the appellants nor the respondent can sensibly welcome the prospect of having to resolve a dispute over the appropriate level of rent for these premises by proceedings in the county court, whichever party initiates them. There would seem to be merit in both parties giving consideration to putting their relationship on a more conventional basis by agreeing to delete clause 3.2 in its entirety from the tenancy agreement so that, in future, any disagreement over the appropriate level of rent can be resolved quickly and economically by a specialist tribunal.

Martin Rodger QC,
Deputy President

15 September 2016