UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – application for rent repayment order by five joint tenants – grounds of application and statement of case supported by statements of truth – no witness statements filed – FTT refusing to permit oral evidence – application dismissed – whether FTT wrong to refuse to permit reliance on grounds of application and statement of case – appeal allowed

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

BETWEEN:

SAMANTHA COBB (1)
THOMAS HERRING (2)
FIONA FRASER (3)
NATASHA CUTLER (4)
HELENA COOKE (5)

Appellants

-and-

MR NAYYER JAHANGHIR
(Deceased)
(By his daughter and personal representative
Saira Jahanghir)

Respondent

Re: 153 Downton Avenue,
London SW2 3TX

Martin Rodger QC, Deputy Chamber President

Heard on 14 June 2022

Ms Clara Sherratt, of Justice for Tenants, for the appellants
Mr Daniel Wand, instructed by Hanne & Co, solicitors, for the respondent

The following case is referred to in this decision:

Broughton v Kop Football (Cayman) Limited [2012] EWCA Civ 1743

Introduction

1. The five appellants were joint tenants of a house which was required to be licensed as an HMO. It was not licensed and the offence of being in control of or managing an unlicensed HMO contrary to section 72(1) Housing Act 2004 (the 2004 Act), was therefore committed by their landlord, Mr Nayyer Jahanghir, unless it could be proven that he had a reasonable excuse for being in control of the HMO in those circumstances.

2. Where a relevant housing offence has been committed, including the offence under section 72(1), the First-tier Tribunal (Property Chamber) (the FTT) has power under section 41 of the Housing and Planning Act 2016 (the 2016 Act) to make a rent repayment order requiring the landlord to repay an amount of rent paid by a tenant. The appellants applied to the FTT for such an order, but the FTT dismissed their application. It did so because it considered the appellants had failed to provide admissible evidence in support of their claim and so were unable to prove the facts necessary to establish beyond reasonable doubt that an offence had been committed. The FTT also made orders for the payment of costs by the appellants and by the organisation which had represented them in the proceedings, Justice for Tenants.

3. The appellants now appeal both the FTT's substantive decision and its costs decision. At the hearing of the appeal they were represented by Ms Clara Sherratt, of Justice for Tenants. Mr Jahanghir had sadly died before the matter was heard by the FTT, and the application and the appeal proceeded against his estate, acting by his daughter and personal representative, Ms Saira Jahanghir. The estate was represented at the appeal by Mr Daniel Wand.

The relevant facts

4. 153 Downton Avenue, Streatham Hill, is a three-storey, four-bedroom, semi-detached house which was the family home of Mr Nayyer Jahanghir until about 2017 when he moved out and went to live with his daughter, Ms Saira Jahanghir. Mr Jahanghir then decided to let the property through a residential letting agency called Focus Properties.

5. In August 2017 the whole of the house was let to the appellants under a tenancy for one year, which was later renewed for a further year from 19 August 201 at a rent of £3,300 per calendar month (inclusive of council tax and water rates). The tenancy agreement provided that each of the tenants was responsible for the payment of the whole of the rent. It also included a covenant by the tenants not to sub-let or part with possession of the property or let any other person live there.

6. Between September 2018 and February 2019 one of the appellants, Mr Herring, moved out of the house and sub-let his room and between February and August 2019 Ms Cooke also moved out and sub-let her room. The appellants say that these sub-lettings took place with the consent of Mr Jahanghir's managing agent. An email from the agent to Mr Herring on 2 September 2019 confirms that at the very least the agent was aware that his room had previously been sub-let and confirmed that the tenants had his permission "to get two guys

into the house on a sublet agreement". The agent appears not to have informed Mr Jahanghir.

7. The second year of the tenancy came to an end in August 2019. Some of the appellants remained in occupation for a few months but by the end of the year they had all moved out.

8. At some point the appellants became aware that Mr Jahanghir ought to have obtained a licence from the local housing authority to let the house as an HMO. When they asked the London Borough of Lambeth they were informed that no licence had been applied for or granted. On 20 October 2020 they applied to the FTT for a rent repayment order.

The application

9. The application was made jointly by all five appellants. Each of them signed the statement of truth which is included in the FTT's standard form of application confirming that they believed that the facts stated in the application were true.

10. The application stated that the house satisfied the standard test of an HMO in section 254, Housing Act 2004 in that: it consisted of one unit of living accommodation occupied by persons forming five separate households; none of the occupants lived elsewhere and in each case the house was their main residence; none of them used the house for any purpose other than for living accommodation; they each paid rent and shared the amenities of the house. It was also said that the house met the criteria for licensing under the Licensing of Houses in Multiple Occupation (Prescribes Descriptions) (England) Order 2006 and 2018 in that it was a three-storey property let out to five unrelated persons. The application also stated that the property should have been licensed but had not been, and that none of the appellants had received housing benefit or universal credit rent contributions for the property.

11. The application asked for repayment of the rent paid in the year ending 19 August 2019 totalling £39,580; that sum was described as having been "paid for by Samantha Cobb on behalf of all of the applicants". It was also said that the total rent being claimed "is split among the applicants… as £7,916 each". Mr Jahanghir was identified as the landlord named in the appellants' tenancy agreement and as the owner of the freehold interest in the property registered at the Land Registry.

12. When they field the application the appellants also supplied a copy of their most recent tenancy agreement, and a spreadsheet showing the monthly rental payments said to have been made by Ms Cobb on their behalf.

13. The FTT gave directions in the application on 29 September 2020. It required the appellants to provide a bundle of relevant documents for use in the application which was to include the application itself and the accompanying documents, "any expanded statement of the reasons for the application", evidence of rent payments, and "the name(s) of any witnesses who will give evidence at any hearing with a signed and dated statement/summary of their evidence stating that it is true." The direction then referred to notes which warned that "the tribunal may decline to hear evidence from any witness who has not provided a statement in accordance with the above directions."

14. The FTT's directions also provided for the respondent to file a statement of his reasons for opposing the application, together with supporting evidence. The appellants were allowed a brief written reply.

15. In compliance with the FTT's directions the appellants filed a further document of five pages providing "full details of the alleged offence" and an "expanded statement of the reasons for the application." The expanded statement repeated the basic facts demonstrating that the house was an HMO. Reference was made to bank statements providing proof of the rent paid by Ms Cobb on behalf of all of the appellants. The total amount claimed was again said to be £39,580, with each applicant applying for repayment of £7,916. The statement continued with further generic commentary on the private rented housing sector. It was again accompanied by statements of truth signed by each of the appellants.

16. The application did not refer to the fact that Mr Herring and Ms Cooke had sub-let their rooms for part of the period in respect of which the rent repayment order was sought. The bank statements which accompanied the application showed 12 payments of rent had been made to the agent during the year in question. The statements also showed some payments by each of the appellants into Ms Cobb's bank account but they were not a complete set for the year and included only those individual pages showing the monthly instalments of rent paid to the agent. It was impossible to tell from the statements how much each of the appellants had paid to Ms Cobb during the year, but it was possible to see that at least one person who was not one of the appellants had paid rent to Ms Cobb during that period; for example, a payment of £660 described as rent was recorded on the bank statement as having been received into the account from Lauren Howard on 20 August 2018.

17. The appellants did not provide any further witness statement.

18. Mr Jahanghir filed a statement of case and a witness statement on 29 November 2020. He accepted in his statement of case that the house was an HMO in the period to which the application related. He also accepted that it had not been licensed and that no application for a licence had been submitted. He explained that he had left the letting of the property to the letting agency which had been "responsible for any legal and/or compliance requirements." Mr Jahanghir did not mention that the tenancy had begun in 2017 and gave the impression that the house had first been let in August 2018. He acknowledged that £39,580 had been paid to the agent by Ms Cobb but pointed out that the incomplete bank statements relied on by the appellants showed only that a little over £11,700 had been paid by them to Ms Cobb. He was concerned "that many people, other than the registered tenants, had been living at the premises and playing rent to Ms Cobb". Ms Howard's name appeared on one of the bank statements as having paid rent to Ms Cobb and letters addressed to eight other individuals were said to have been received at the property since the tenancy had come to an end.

19. Although he accepted that the house was an HMO, Mr Jahanghir nevertheless required the appellants to prove that he was the "person having control" or "person managing" the house for the purpose of section 263 of the 2004 Act. If the FTT was satisfied that that condition was met so that an offence had been committed, Mr Jahanghir said that he relied on the statutory defence in section 72(5) of the 2004 Act, namely that he had had a reasonable

excuse for having control of or managing an HMO without a licence. That excuse was that he had left everything to the managing agent to arrange. If the FTT rejected that defence Mr Jahanghir accepted "that the FTT may make a finding that it has been proved beyond reasonable doubt that the respondent has committed an offence and that, as a result, a rent repayment order should be made".

20. The appellants filed a response to the material supplied by Mr Jahanghir. They noted that Mr Jahanghir had accepted that, as they put it, "the breach occurred". They also took issue with Mr Jahanghir's chronology and various points of detail but did not respond to the suggestion that people other than the five appellants had been living at the property.

The hearing before the FTT and its decision

21. All of the appellants except Mr Herring joined the remote video hearing on 14 September 2021 at which they were represented by Miss Sherratt. By that time Mr Jahanghir had died and his estate was represented by Mr Wand.

22. Ms Sherratt had taken instructions from the appellants for the first time on the previous day and she had been made aware that Mr Herring and Miss Cooke had each sublet their rooms in the house for six months. She explained this to the FTT at the start of the hearing. She also explained for the first time that each of the appellants had paid a different amount for their room and that their contributions towards the rent had not been equal. She asked either that she be given permission to submit a revised schedule of rent after the conclusion of the hearing identifying what had been paid by whom and for what periods or that the hearing be adjourned to enable further evidence to be prepared.

23. Mr Wand, who appeared on behalf of the respondent objected to Ms Sherratt's proposals and the FTT refused to permit the appellants to adduce further evidence or to adjourn the hearing. In its subsequent decision it explained its reasoning as follows:

> "The tribunal carefully considered the application to adduce further evidence and/or an adjournment. In doing so the tribunal considered the overriding objective and the issues raised by admissions made by the applicants and the application to rely on further fundamental evidence that went to the substance of the application. Although the tribunal frequently exercises a degree of leniency to parties in respect of their compliance with directions, particularly where a party appears unrepresented, the tribunal determined that in this application these matters should and could have been addressed at a much earlier stage by the applicants as they went to the substance of their application. The tribunal determined in the absence of any or any compelling reason as to why this evidence could not have been provided earlier, that prejudice was caused to the respondent and to the tribunal's proper management of its resources. Therefore, the application to adduce further evidence and/or to adjourn was refused."

24. Ms Sherratt then applied to call two of the appellants to give oral evidence about the subletting of rooms and rent payments. The FTT refused that application and later gave this explanation:

> "None of the applicants had complied with the tribunal's direction by making any witness statement on which they could rely as their evidence in chief. As the evidence on which the respondent would wish to cross-examine went to the substance of whether and when an offence was being committed, the tribunal considered it unfair and prejudicial to the respondent to allow the applicant to rely on oral witness evidence in the absence of any witness statement and about which the parties had been warned in the tribunal's directions. The tribunal also considered that although the tribunal has a wide discretion when considering to admit evidence, it was nevertheless mindful of the fact that the applicants asserted that the respondent had allegedly committed a criminal offence, for which ramifications could be both wide-reaching and substantial. Therefore, the tribunal did not permit the applicants to give oral evidence to the tribunal as no witness statements were available to the respondents on which they could be cross-examined."

25. Mr Wand then invited the FTT to dismiss the application. He submitted that material included in the appellants' statement of case "was not evidence" and in any event the appellants had already accepted that parts of it were untrue. For her part, Ms Sherratt invited the FTT to proceed on the basis of the documentary evidence and asked to be allowed to rely on the appellants' statement of case. The FTT refused that request. In its subsequent written decision it explained:

> "The tribunal determines that in the absence of any witness evidence, which could be relied upon as evidence in chief, the applicants have failed to prove beyond all reasonable doubt that an offence was committed by the respondent. The tribunal also determines that in the absence of such evidence from the applicants, the respondent is not required to give evidence, which may or may not be used by the applicants to "prove their case". Therefore, the tribunal dismisses the applicants' case."

26. In a subsequent decision on costs the FTT directed that the appellants should pay the respondent £1,000 plus VAT on the grounds that their conduct of the application had been unreasonable. In particular, they had failed to serve witness statements making necessary corrections to their application. The FTT also ordered that Justice for Tenants should pay £1600 plus VAT as a contribution towards the respondent's costs.

The appeal

27. Ms Sherratt advanced four grounds of appeal. They were:

    (1) that the appellants had been denied the opportunity to participate fully in the proceedings;

(2) that the FTT had adopted an inappropriately formalistic approach to the appellants' failure to comply with the direction requiring the service of witness statements and had failed to proceed with any degree of flexibility;

(3) that it had unjustly denied the appellants the opportunity to rely on the material in the hearing bundle filed by the respondents; and

(4) that it had erred in holding that the appellants had failed to prove beyond reasonable doubt that an offence had been committed.

28. The target of the first three grounds of appeal is the FTT's decision to refuse to permit the appellants to give oral evidence in support of their application. As Mr Wand pointed out, that was a case management decision. Mr Wand therefore relied on the undoubted principle that an appellate tribunal should rarely interfere with the exercise by a first instance tribunal of its case management function and will only do so if it was plainly wrong.

29. In *Broughton v Kop Football (Cayman) Limited* [2012] EWCA Civ 1743 the Court of Appeal reiterated the importance of supporting first instance judges who make robust but fair case management decisions. Lewison LJ explained how an appellate court or tribunal should approach appeals against such decisions, at [51]:

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

30. When she explained to the FTT that two of the appellants had sublet rooms in the property to persons who were not themselves applicants, Ms Sherratt had intended to reduce the amount of rent for which a repayment order was sought. It is nevertheless apparent from paragraph 9 of the FTT's decision reproduced at [24] above, and in particular from its reference to "further fundamental evidence that went to the substance of the application", that the FTT considered that the application could not succeed to any extent without the appellants correcting the impression given by their statement of case that they, and they alone, had lived at the property for the whole of the year in question. It had the same point in mind when in paragraph 11, reproduced at [25] above, it described the additional evidence which was proposed to be given as going "to the substance of whether and when an offence was being committed". The FTT's view that it would be unfair to the respondent to allow new evidence to be given seems to have been based on its belief that the evidence was essential to the success of the application.

31. The appellants' fourth ground of appeal, which complains that the FTT was wrong in finding that they had proved beyond reasonable doubt that an offence was committed, engages the same point. It raises the question whether it was necessary for the FTT to investigate the identity of those in occupation or the periods of occupation before it could be satisfied that an offence had been committed.

32. The FTT made no reference in its decision to the fact that Mr Jahanghir admitted that for the whole of the period in question the house was an HMO. The appellants had asserted that in their grounds of application and in their statement of case, and in his statement of case, drafted by Mr Wand, Mr Jahanghir had admitted it. It was a necessary inference from that omission that Mr Jahanghir accepted that for the whole of the year in question the house had been occupied by five or more persons (see Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 (the 2018 Order).

33. Because their statements of case showed that the parties agreed that the house was an HMO, that was not something which the appellants were required to prove in order to be entitled to a rent repayment order. The FTT did not appreciate that.

34. I do not think that the revelation on the morning of the hearing that two of the appellants had sublet their rooms in the house each for a period of six months made any difference to the facts which the appellants were required to prove. The offence which the appellants relied on as the basis of their application was that contrary to section 72(1) of the 2004 Act, Mr Jahanghir had had the control or management of an HMO which was required to be licensed but which was not so licensed. Whether a property is an HMO does not depend on whether the people in occupation are tenants or subtenants, or a mixture of the two; it depends only on the number of people in occupation and their living arrangements. The standard test in section 254(2), 2004 Act focusses on the use being made of the accommodation, whether those who are in occupation form a single household, and whether two or more of the households who occupy the accommodation share one or more basic amenities. Similarly, the type of HMO which is prescribed by the 2018 Order as requiring to be licensed does not depend on the status of the people in occupation. All that is required is that the HMO is occupied by five or more persons, living in two or more separate households, and that it meets the standard test under section 254(2).

35. It was therefore irrelevant to the offence on which the application depended that, for part of the period under consideration, some of those in occupation of the house were sub-tenants, rather than direct tenants of the respondent. It was equally irrelevant that those who were in occupation were not the same people at all times.

36. Of course, Mr Jahanghir complained in his statement of case that there may have been people other than the appellants in occupation of the house. But that complaint was made at the same time as he admitted that the house was an HMO. It was not Mr Jahanghir's case that the number of persons in occupation had fallen below five at any time in the relevant period.

37. Once it was admitted by Ms Sherratt on behalf of the appellants that two of them had not been living at the house for part of the year, Mr Jahanghir might have wished to withdraw his admission that the house had always been an HMO. He might have wanted instead to put the appellants to proof that there had been five people living there at all material times. If there had been part of the year when there were fewer than five people in occupation, no offence would have been committed during that period. But the FTT's decision contains no reference to a withdrawal of the admission and Mr Wand did not suggest that he had sought to do so. If he had asked the FTT for permission to withdraw the admission he could, of course, have been given it. But where a gap in the evidence is created by the withdrawal of an admission, fairness requires that the other party be given the opportunity to fill that gap by calling additional evidence, as the appellants wished to do in this case.

38. The FTT was therefore wrong, in my judgment, to regard the identity of those in occupation as fundamental to the question of whether and when any offence had been committed. The only issues between the parties identified in their statements of case were whether Mr Jahanghir was the person managing or in control of the HMO, and whether he had a reasonable excuse for not having a licence. The burden of proving the defence of reasonable excuse was on Mr Jahanghir, and nothing in the appellants' evidence was relevant to that question. The question whether he was the person in control or managing the HMO was a question of law which fell to be determined on the basis of the undisputed fact that Mr Jahanghir was in receipt of the rent for the premises which, on any view, was a rack rent (see section 263(1), 2004 Act).

39. I am therefore satisfied that when the FTT decided that the appellants should not be permitted to give further evidence about the periods of subletting of the property, it was mistaken in regarding that material as "fundamental evidence that went to the substance of the application".

40. The FTT's refusal to permit the appellants to give oral evidence was also based on the absence of any witness statements. But that overlooked the other formal documents in which the appellants had explained their case, namely their grounds of application and their statement of case, both of which contained statements of truth signed by each of the appellants. The FTT's directions required that a witness statement should identify the case, be arranged in numbered paragraphs and end with a statement of truth and the signature of the witness. The appellants' grounds of application and statement of case satisfied those minimal requirements. Nothing more elaborate in terms of the form of the document was required. It is quite true that two of the appellants would, at least, have had questions to answer about the period of their occupation of the house. But those questions were already prepared for them and highlighted in the respondent's own statement of case which included the names of nine persons suspected by the respondent of having some connection with the house. The FTT might, after hearing the evidence, have considered that it was so unsatisfactory that it would reduce the amount of any rent repayment order it would otherwise have made, but what it could not fairly do was exclude any evidence from the appellants on the grounds that they had not provided a witness statement. They clearly had.

41. I agree with the appellants that the FTT's approach to the additional evidence they wished to rely on (to reduce the amount of their claim), and to the form in which their original case

was presented, was misconceived and formulaic. In the face of the admissions made by Mr Jahanghir the FTT was clearly wrong to consider that the appellants had failed to provide material capable of proving beyond reasonable doubt that an offence had been committed. The only question was whether the statutory defence of reasonable excuse could be made out, and the evidential burden on that issue lay on the respondent. Far from being fundamental evidence which went to the substance of the application, the additional evidence on which the appellants wished to rely was unnecessary, because of the admissions. If those admissions had been withdrawn, it would have been necessary for the appellants to have been given the opportunity to adduce additional evidence. There was nothing unfair in expecting the respondent's counsel to cross-examine the appellants on the basis of his own case that people other than the appellants had been in occupation.

42. If the FTT had considered and rejected the statutory defence of reasonable excuse it would have been obliged to find on the basis of Mr Jahanghir's admission that an offence had been committed during the whole of the relevant year and that it had jurisdiction to make a rent repayment order. It would then have had to consider whether the fact that some of the appellants had sublet their rooms for part of the time was material to the amount of the rent repayment order which could be made. The five appellants were joint tenants, each of whom was liable for the whole of the monthly rent. As joint tenants they were entitled, jointly, to make an application under section 41(1) 2016 Act for a rent repayment order. One proper order which the FTT could have made would have been an order in favour of all five appellants for payment to them of a single sum. It was not necessary for the FTT to be concerned about the proportions in which the appellants had contributed towards the monthly rent nor even whether one or other of the appellants had been out of occupation for part of the year. The FTT could of course have taken into account the conduct of the appellants if it was satisfied that any subletting was in breach of the tenancy agreement. It could also, in its discretion, have reduced the amount of the rent repayment order to reflect the fact that the source of some of the rent was money received by the appellants from their sub-tenants, but it certainly was not obliged to do so. The rent repayment regime is not compensatory, it is intended to act as a deterrent to "rogue" landlords, and often involves a windfall for tenants who have occupied property without experiencing any disadvantage or inconvenience from the fact that an HMO licence has never been granted to their landlord.

43. For these reasons I consider that the FTT was wrong in its approach to the case management decision whether to permit the appellants to adduce further oral evidence supplementing and correcting their grounds of application and statement of case. The appellants were advised by unqualified lay representatives who failed to take proper instructions and who delayed in correcting errors. But even a professionally represented party can make mistakes, as Mr Jahanghir did when he signed a witness statement suggesting that they house had been let for only one year. The appellants should have done what Mr Jahanghir was advised to do, which was to submit a second statement correcting errors that he had made in his own original account. There was nothing in the errors themselves which stood in the way of the FTT determining the application on the day which had been appointed for it and it should have done so. For these reasons I set aside its substantive decision.

44. The FTT's orders for costs made against the appellants and their lay representatives cannot survive the setting aside of its substantive decision. The orders were based on the proposition that the appellants had behaved unreasonably by coming to the tribunal unable to prove the serious offence they alleged against Mr Jahanghir. That proposition was unsound and I also set aside the costs orders.

45. There has been no determination of the reasonable excuse defence, nor any investigation of the facts relevant to the amount of rent which it would be appropriate to order should be repaid if an offence was committed. For those reasons, as both parties agreed, it is necessary for me to remit the application to the FTT for further consideration by a differently constituted panel.

46. I was asked by both parties to give initial directions so that progress could be made towards a resolution of the application. I direct that the Estate file an amended statement of case making clear the extent to which the admissions previously made are intended to be withdrawn. That can be done within 21 days. The appellants should then file any additional evidence on which they wish to rely in support of the application within a further 21 days. The parties should also consider whether they would be assisted to an earlier and more economical resolution of this dispute by a mediator. If they are attracted by that suggestion, they will find the FTT itself is in a position to provide a mediation service.

Martin Rodger QC

Deputy Chamber President

25 July 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.