UPPER TRIBUNAL (LANDS CHAMBER)

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Royal Courts of Justice,
London, WC2A 2LL

25 August 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – evidence – pro forma witness statements – whether there was evidence from which the FTT could have found that the standard HMO test was satisfied – appeal dismissed

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

BETWEEN:

RACHEL CAMFIELD (1)
NICOLE DUCASSE (2)
JOSH WORTH (3)
RYAN DONELLY (4)
ROHAIL RAFI (5)

Appellants

-and-

NEHIZENA UYIEKPEN (1)
THRILLA GUKUTA (2)

Respondents

Re: 44 Abercrombie Road,
London E20

Martin Rodger QC, Deputy President

Heard on: 23 August 2022

George Penny of Flat Justice Community Interest Company Ltd for the applicants
Iain Colville, instructed by Dumonts Solicitors, for the respondents

The following cases are referred to in this decision:

Bradford Metropolitan City Council v Anderton [1991] RA 45

Mortimer v Calcagno [2020] UKUT 122 (LC)

Opara v Olasemo [2020] UKUT 96 (LC)

Williams v Horsham District Council [2004] EWCA Civ 39

1. This is an appeal against a decision of the First Tier Tribunal (Property Chamber) (the FTT) given on 23 January 2022 by which it dismissed an application by the appellants under section 41 of the Housing and Planning Act 2016 for a rent repayment order against the respondents. The issue in the appeal is whether the FTT was right to conclude that there was insufficient evidence to enable it to make an order.

2. At the hearing of the appeal the appellants were represented by Mr George Penny of the Flat Justice Community Interest Company Ltd. The respondents were represented by Mr Iain Colville. I am grateful to them both for their submissions.

Relevant legislation

3. The power to make a rent repayment order is contained in Chapter 4 of Part 2 to the Housing and Planning Act 2016. Section 40 identifies a number of criminal offences. If a landlord is shown beyond reasonable doubt to have committed one of those offences the FTT has power under section 43 to require them to repay an amount of rent to their tenant.

4. The relevant offence in this case is the offence of being of person having control of or managing an HMO which is required to be licensed under Part 2 of the 2004 Act but which is not so licensed, contrary to section 72(1), Housing Act 2004.

5. For a person to commit that offence they must have control of, or be managing an HMO (a house in multiple occupation). Section 254(2) of the 2004 Act contains the standard test of an HMO. A building or a part of the building meets the standard test if the following conditions are met: (a) it must consist of one or more units of living accommodation not consisting of a self-contained flat or flats; (b) the living accommodation must be occupied by persons who do not form a single household; (c) they must occupy the living accommodation as their only or main residence or be treated as so occupying it; (d) their occupation of the living accommodation must constitutes the only use of it; (e) rent must be payable by at least one of the occupiers; and (f) two or more of the households who occupy the living accommodation must share one or more basic amenities.

6. Part 2 of the 2004 Act provides for HMO licensing. It does not apply to all HMOs but only to those which fall within a prescribed description (section 55(2), 2004 Act). The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 provides, at article 3, that an HMO which satisfies the standard test will be of a prescribed description it is occupied by five or more persons living in two or more separate households.

The facts

7. In 2019 the first respondent, Mrs Nehizena Uyiekpen and the second respondent, Thrilla Gukuta, came across guidance on the internet explaining how to make money from a "rent-to-rent strategy". They studied the guidance and decided, as Mrs Uyiekpen put it, "to get into the property game".

8. On 28 November 2019 Mrs Uyiekpen took an assured short-hold tenancy of a recently completed four-bedroom house in Newham. In her evidence she described the house as "high end". The tenancy was arranged by Foxtons, as agents for the owner, and was for a period of 2 years at a rent of £3,200 a month. It included a term that the tenant would not sublet the property without the prior consent of the landlord. Mrs Uyiekpen did not intend to occupy the property herself, but nor did she ask for consent to sublet it.

9. Mrs Uyiekpen and Ms Gukuta agreed that they would use the name TNG International Properties to let the property to sub-tenants (TNG being Ms Gukuta's initials). Ms Gukuta was to be responsible for day-to-day contact with the tenants, who paid their rent into her bank account.

10. The house has four bedrooms and a living room which was also to be used as a bedroom so that there would be five tenants at any one time. Three of the five appellants (Helen Camfield, Ryan Donnelly and Rohail Rafi) became tenants in December 2019. Nicole Ducasse became a tenant in January 2020.

11. At the start of the arrangement the fifth tenant was Ms Kate Tseng. She took a tenancy of one room on 21 December 2019 and remained a tenant until 21 March 2020. The basic facts about Ms Tseng's tenancy were recorded in the appellants' evidence to the FTT. They were confirmed in a witness statement by Ms Gukuta who provided the additional information that Ms Tseng had paid £2,850 in rent during the three months of her occupation. There was therefore no dispute that between 19 January 2020 when Nicole Ducasse moved in and 21 March 2020 when Kate Tseng moved out the house had been occupied by five individuals living in separate households.

12. Mr Donelly moved out on 30 April 2020 and it was not until 6 June 2020 that there were again five people living in the property. On that date someone known only as Ali moved in but he stayed for only 8 days, moving out on 14 June.

13. On 25 July 2020 the two vacant rooms in the house were let by the respondents to a Brazilian family of five, including three children under the age of six, who were said by Mrs Uyiekpen to be in desperate need of short-term accommodation. The arrival of the family led one of the appellants to contact Foxtons, who immediately required Mrs Uyiekpen to bring the sub-tenancies to an end, which the respondents promptly did. The circumstances in which the last of the residents was encouraged to leave at short notice were the subject of an allegation of unlawful eviction but the FTT was not satisfied that an offence had been proven and that allegation does not form any part of this appeal.

The application

14. In October 2020 the appellants applied to the FTT for a rent repayment order. Their application was based on alleged offences contrary to section 72(1), 2004 Act and section 1(3A), Protection from Eviction Act 1977. It was prepared by Flat Justice and was supported by a schedule identifying the dates of occupation of each of the five rooms in the building and the names of the occupiers. The schedule said nothing about what later came to be referred as the "status" of the occupiers, by which was meant whether they occupied

the accommodation as their only or main residence so as to satisfy the condition in section 254(4)(c), 2004 Act which forms part of the standard test of an HMO.

15. The five appellants later filed witness statements in March 2021. The statements were very similar and give the impression of being based on a pro-forma draft addressing, each in a single sentence, the conditions required to demonstrate that the property was an HMO. Minimal additional information was inserted to provide details of the witness's name, period of occupation, rent and other details. Only when the statement addressed matters of conduct did any detail begin to emerge.

16. The standard form of the witness statements can be illustrated by referring to the document signed by Nicolle Ducasse. I quote the relevant part in full, omitting only some brief allegations about an absence of safety precautions randomly inserted after paragraph 7.2:

> "4. The property was my main residence during my occupancy.
>
> 5. I shared the property with up to 5 other occupants. We shared 3 bathroom(s) and 1 kitchen(s).
>
> 6. The occupants were from more than one family or household. In fact we were made up of 5 separate households.
>
> 7.1 I was assigned a room in the property: top floor en-suite bedroom (own bathroom for sole use).
>
> 7.2 I intended to stay at the property for at least 6 months. …
>
> 8. The property was occupied as per the Occupancy Table shown in the applicant bundle with this statement."

17. The statement went on to provide, in rather more personal terms, an account of alleged acts of harassment. It concluded with a statement of truth.

18. The witness statements prepared by the other appellants were in more or less identical terms, except for the allegations of harassment which differed slightly.

19. The deficiencies of this form of evidence are not difficult to see. By limiting the information provided to a bald confirmation of the statutory qualifying conditions the witness leaves many questions unanswered. What did she mean by the statement "the property was my main residence"? Did she have other residences? If so, where were they and how much time did she spend there? What was it that made this property her main residence? Similarly, the statement that "the property was occupied as per the Occupancy Table shown in the applicant bundle with this statement" begs the question whether the witness had seen that bundle or the table said to have been included in it and how she was able to confirm its contents. How would she know who lived there before or after her period of occupation?

20. More significantly, none of the appellants said anything about Kate Tseng whose name appeared in the occupation schedule but who did not provide a witness statement and was not mentioned by any of them.

21. In May 2021 the respondents filed a statement of case prepared by counsel. It quoted article 3 of the 2018 HMO Order, including the reference to the standard test, and section 254(2) of the 2004 Act, highlighting in bold text the requirement that "the living accommodation was occupied by those persons as their only or main residence." The respondents specifically put the appellants to proof of that condition and pointed out that there was no evidence from Ms Tseng about whether the property was her only or principle home. Nor was there any evidence that Ali had occupied the property as his only or principal home during the period of 8 days when he was said to have be there. The respondents' case was therefore that the appellants had not established that the property was an HMO.

22. The hearing had originally been due to take place before the FTT in May 2021 but it was postponed and eventually took place on 27 September. The appellants therefore had time to consider the points made in the respondents' statement of case and to provide additional evidence to meet them, yet no further evidence was filed between May and September.

The FTT's decision

23. In its decision the FTT summarised the statements of case and written evidence of both parties. Four of the five appellants attended the hearing and gave oral evidence, and each confirmed that the property was their main residence. The FTT's account of the evidence largely followed the witness statements and said nothing whatsoever about the occupation of the property by Ms Tseng other than confirming the dates she had lived there. The FTT had clearly not overlooked the significance of Ms Tseng's status because it recorded counsel for the respondents' submission that no evidence had been provided about her and that it could not be assumed that she had occupied the property as her only or principal home.

24. The part of the FTT's decision which is material to this appeal is paragraph 40, where it said this:

> "However, the tribunal is only able to make a rent repayment order if satisfied beyond reasonable doubt that the offence under section 72(1) had been committed. In that regard the Tribunal accepts the submissions of [counsel for the respondents] that, within the period in respect of which the claim has been made in the statement of case, there were a maximum of four tenants who had provided witness statements. The Tribunal accepts counsel's submission that it has no evidence as to the relevant status of Yung-Ru Tseng and could not therefore be satisfied that she met the necessary qualifications to permit the making of a rent repayment order."

25. The FTT also dealt with the presence of the Brazilian family for a period of 8 days in July 2020 finding that the period of their occupation was not part of the period in respect of

which the application was made. For those reasons the FTT found that the allegation that the respondents had committed the offence of being in control of an unlicensed HMO had not be proven and the claim therefore failed.

The appeal

26. The appellants sought and were granted permission to appeal on a single ground, namely, that the FTT had erred in finding that the offence under section 72(1) had not been proven beyond reasonable doubt. This was initially put on the basis that the FTT had concluded that the occupancy level of the property had not been proven but when he opened the appeal Mr Penny sought permission to amended his ground of appeal to focus on the real issue which was whether the individuals who occupied the property were doing so as their only or main residence. Mr Colville objected to that amendment but I permitted it as it had been apparent since their original statement of case that the respondents' case was based on the absence of evidence about the quality of occupation and not the period of occupation.

27. Mr Penny submitted that the FTT had erred in its assessment of the effect of the evidence. He referred to two decisions of this Tribunal (both decisions of Judge Cooke), *Opara v Olasemo* [2020] UKUT 96 (LC) and *Mortimer v Calcagno* [2020] UKUT 122 (LC). Those establish demonstrate that it is not necessary to have first-hand evidence from all of the occupants of a house to prove its status as an HMO beyond reasonable doubt. Direct evidence from some of the occupants, perhaps supported by collaborating documents, may be sufficient to prove beyond reasonable doubt that the necessary conditions were satisfied. Both cases also demonstrate that it is open to the FTT to draw inferences from facts which it finds to be proven, provided it is satisfied to the criminal standard of proof.

28. In *Opara* the issue was whether the FTT ought to have been satisfied to the criminal standard that the occupants lived in the property as their only or main residence. The two critical occupants of the house were not called to give evidence but, at [31], the Tribunal said this:

> "In the absence of cooperation from other residents, cast-iron certainty is not going to be achievable on this point because of the difficulty of proving a negative; and of course cast-iron certainty is not required, only proof of beyond reasonable doubt. How is the tenant to show that another occupant has no other home, or no other main home? This element of the offence must to some extent be a matter of inference from the circumstances."

The Tribunal then made some observations about the property and the evidence in that case:

> "This is low-value housing – cheap rooms, to be blunt. The tenants were not people who were likely to have had a second home. Certainly a recipient of housing benefit should not have one."

The evidence established that one of the two occupants whose status was in issue had lived in the property for a number of years and was responsible for paying utility charges. It seemed to have been accepted that his home was at the property. The other occupant was in receipt of housing benefit, a fact which the Tribunal regarded as "significant". The Tribunal concluded that there was strong evidence that both individuals had their home at the property and that it was likely to be their only residence, and that the FTT's conclusion that the offence had not been proven was unsustainable.

29. Mr Penny submitted that the FTT should have inferred from the information it had been provided with that Ms Tseng occupied this property as her only or main residence. The question ought to have been whether, while she was in occupation, she occupied the property as her only or main residence. He identified three facts from which he suggested that inference should have been drawn. First, that Ms Tseng had paid a rent of £950 a month. That was a significant sum, and it was unlikely, he suggested, that someone would have paid it in rent except for their only or main residence. Secondly, that she had occupied the property for three months from 22 December until 22 March, which was a sufficiently long period to indicate that the property was likely to have been her only or main residence. Thirdly, that she had brought her belongings to the property. Those three pieces of evidence were sufficient, Mr Penny submitted, to support the inference that Ms Tseng had occupied the property as her only or main residence for three months.

30. Whether a person occupies property as a residence is a question of fact. Guidance on the quality of occupation which is required and factors which will indicate that the requirement is satisfied can be obtained from decisions of other courts and tribunals, but the question remains a question of fact in every case. It is a question which arises in a number of different statutory contexts including, for example, in cases concerning liability for property taxes.

31. *Bradford Metropolitan City Council v Anderton* [1991] RA 45 concerned the liability of a merchant seamen to pay the community charge during periods when he lived with his wife on shore. The question was whether the family home was "his sole or main residence" and Hutchison J summarised a number of authorities which established that a persons sole or main residence is "where his home is, where he has his settled and usual abode."

32. In *Williams v Horsham District Council* [2004] EWCA Civ 39, which concerned the liability of a school caretaker to pay council tax for a house which he did not live in because his employment required him to live at the school, the Court of Appeal said, of the expression "sole or main residence" in section 6 of the Local Government Finance Act 1998, that it:

> "… refers to premises in which the taxpayer actually resides. The qualification "sole or main" addresses the fact that a person may reside in more than one place. We think that it is probably impossible to produce a definition of "main residence" that will provide the appropriate test in all circumstances. Usually, however, a person's main residents will be the dwelling that a reasonable onlooker, with knowledge of the material facts,

would regard as that person's home at the material time. That test may not always be an easy one to apply."

33. *William v Horsham* was a second appeal from a local valuation tribunal; the Judge on the first appeal had referred to a number of matters which the tribunal had correctly identified as relevant to the issue whether the caretaker's property was his only or main residence. Those factors included: his intention to return to live at the property; the period of his absence and reasons for it; his legal interest in the property; the security of tenure he enjoyed there; the whereabouts of personal belongings; the place where his spouse and children resided; and his place of registration for dental, medical and electoral purposes.

34. The difficulty for the appellants in this case is that there was not a single piece of evidence directly addressing the quality of Ms Tseng's occupation of the property or the facts relevant to it. Nothing was known about her other than that she had paid a rent for a room for a period of three months and had moved belongings into the property. Nothing was known about her personal circumstances, her age, her nationality, whether she had a family, whether she was employed, whether she had an income or received benefits, including housing benefit, how long she spent at the property during her period of residence, whether she went away at the weekends or for other periods, whether she spent the Christmas and New Year holiday period at the property, where she went when she left, and why she left. Evidence on some or all of those matters would have allowed the FTT to consider whether it was satisfied beyond reasonable doubt that she occupied the property as her only or main residence, that it was her home, in other words, and not simply a convenient temporary place to live while she spent time in London. The facts known to the FTT were not inconsistent with a number of different possible life stories. Ms Tseng might have been a student from abroad who had come to this country for a short period of study, or a person working in London but living somewhere else in the country who returned to her permanent home at the weekends or at other times when she was not working. She may have had a home elsewhere which an informed observer could have concluded was her main residence. The FTT might have felt able to exclude those possibilities if it had been told anything at all about her, but it was not.

35. This appeal is not an appeal on a point of law only. A right of appeal is available in a rent repayment case whenever a person is aggrieved by the decision of the FTT (section 53(1), 2016 Act). Nevertheless, this Tribunal's approach to FTT decisions on issues of fact is clear. The Tribunal will only set aside a decision on an issue of fact where it was not supported by any evidence or where the decision was one which no reasonable tribunal could have reached. Mr Penny did not put his submission as high as to say that the only conclusion which the FTT could properly have arrived at was that Ms Tseng occupied the property as her only or main residence, but in my judgment any conclusion short of that extreme position would be insufficient to justify this Tribunal in interfering with the FTT's decision.

36. No criticism can be made of the FTT's statement that "it has no evidence as to the relevant status" of Ms Tseng. It was plainly entitled to come to that conclusion, and it was not obliged to resort to unreliable inferences. It was not saying that there was no evidence at all about her and it cannot be assumed that it overlooked that she had occupied the property between 22 December and 22 March and had paid rent for it. But it was entitled

to conclude that there was no evidence bearing on the critical question of whether the property was her only or main residence. The opportunity to draw inferences favourable to the appellants was explained to the FTT in Mr Penny's written closing submissions but, as was submitted on behalf of the respondents, the known facts were equally consistent with an inference that she had moved out of the property to return to her main home on 22 March 2020, the day before the commencement of the national coronavirus lockdown.

37. This case is an example of the dangers of adopting a formulaic, tick box approach to the evidence necessary to prove the elements of a criminal offence to the required criminal standard. The pro-forma witness statements relied on by the appellants omitted to mention one of the critical conditions. The documents are so concise and impersonal that it is impossible to find in them any material from which to begin to form an impression of the applicants and their house mates. Those of the appellants who attended the hearing before the FTT and who gave evidence were able to make good the shortcomings of their written statements, but nobody seems to have noticed the need for evidence concerning the quality of the occupation of those who were not giving evidence, but proof of whose status was essential. One of the necessary elements of the offence was simply not addressed. The appellants would have been better advised to state the facts relevant to their occupation of the property in their own words and to explain what they knew of the others who were not going to be called to give evidence. Had they done so the outcome of the application might have been very different. As it is, I dismiss their appeal.

Martin Rodger QC,

Deputy Chamber President

25 August 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.