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Case No: LC-2023-739

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/00BB/HMB/2023/003

18 September 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – party failing to attend a hearing – matters to be considered when deciding whether to proceed in party's absence – rule 34, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal dismissed

BETWEEN:

MICHAEL OSAGIE

Appellant

-and-

KINGSLEY ONWUKA
UYIOGHOSA LEO AMADASUN

Respondents

52 Wanlip Road,
London E13 8QP

Martin Rodger KC, Deputy Chamber President

Decision on written representations

The following cases are referred to in this decision:

English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605

R v London County Quarter Sessions Appeals Committee ex p Rossi [1956] 1 QB 682

Introduction

1. This appeal raises a short point about the matters which must be considered by the First-tier Tribunal, Property Chamber (the FTT) when deciding whether to proceed with a hearing which one party has failed to attend.

2. The appeal is against a rent repayment order made by the FTT on 15 September 2023 requiring the appellant, Mr Osagie, to repay rent totalling £12,600 to the respondents, his former tenants, Mr Onwuku and Mr Amadasu.

3. The Tribunal directed that the appeal be determined on the basis of the parties' written representations.

The rule

4. Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides as follows:

> **Hearings in a party's absence**
>
> 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.

5. The default rule in the FTT is that the tribunal must hold a hearing before making a decision which disposes of proceedings (rule 31(1)) and must give each party reasonable notice of the time and place of the hearing (rule 32(1)). As can be seen from rule 34, above, the FTT has a discretion to proceed with a hearing in the absence of one of the parties if two conditions are satisfied.

6. The first condition is that the FTT must be satisfied that the party who has failed to attend has been notified of the hearing, or that reasonable steps have been taken to notify them. That condition reflects a fundamental principle identified by Denning LJ in *R v London County Quarter Sessions Appeals Committee ex p Rossi* [1956] 1 QB 682, 691:

> "[I]t is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them."

7. The second condition is that the tribunal must consider that it is in the interests of justice to proceed with the hearing. That condition reflects the FTT's overriding objective of dealing with cases fairly and justly (rule 3(1)). Needless to say, the second condition can only be satisfied if the FTT has given some thought to whether it is, or is not, in the interests of justice for it to proceed with the hearing in the

absence of one of the parties. A decision to proceed without considering the interests of justice would not be a valid exercise of the discretion.

The facts found by the FTT

8. The appellant, Mr Osagie, is the owner of a house at 52 Wanlip Road, London E13. He let rooms in the house to the respondents, Mr Onwuku and Mr Amadasu, in April 2021. On 27 January 2023 Mr Osagie was allowed into the property by the respondents on the pretext that he wanted to carry out some electrical work and, while they were out, he arranged for the locks to be changed and removed their belongings. Mr Osagie later claimed that he believed the respondents had already moved out, but they had not, as he well knew. When Mr Amadasu returned home later the same day, he was unable to get in. After consulting the police he and Mr Onwuku called a locksmith of their own and obtained entry to the property, where they were forced to sleep on bare mattresses in the clothes they had been wearing that day.

9. On the following night, 28 January 2023, shortly before midnight, the respondents were disturbed by Mr Osagie's daughter, who forced her way into the house, while two men who were with her were kept out only by Mr Amadasu locking the door; soon Mr Osagie himself arrived and the police were called by the respondents. Mr Osagie claimed that they were squatters who had broken in and that he had not met either of them before, but the police did not accept that account and told him that he should follow the proper process if he wished to recover possession.

10. On 7 February Mr Osagie gave the respondents notice that he required them to vacate the property but on 8 and 9 February a man claiming to be Mr Osagie's property manager twice attempted to force his way in, while Mr Osagie sat in his car outside.

11. The respondents issued proceedings against the appellant in the County Court claiming damages and seeking an injunction to compel the return of their belongings and to protect them from further harassment. They also commenced separate proceedings for the return of deposits which they had paid to Mr Osagie.

12. An initial order was made for an injunction and damages on 28 February 2023 and the injunction proceedings were subsequently disposed of by agreement on the terms of a Tomlin order dated 26 May 2023. Mr Osagie agreed to pay the respondents compensation of £7,644 for illegal eviction plus their costs of the proceedings. The Tomlin order includes a confidentiality clause by which the parties agreed that neither of them would disclose the contents of the order except as required by law.

13. At a hearing on 5 April 2023, which Mr Osagie did not attend, a final order was made in the deposit proceedings entering judgment for £2,000 in favour of each respondent and requiring the appellant to pay their costs.

The rent repayment proceedings and the FTT's decision

14. I have been provided with access to the FTT's file from which shows the progress of the respondents' application for a rent repayment order.

15. The respondents' application was dated 6 February 2023 and the appellant was notified of it on 8 February. All communications between the FTT and the appellant were then by email. Directions were issued on 24 March and on 4 May the FTT gave the parties notice of the date of the hearing. The notice of hearing was an attachment to an email which was sent to their respective email addresses. The email was received by the respondents. It is also now apparent from the FTT's file that the notice of hearing must also have been received by Mr Osagie, because solicitors instructed by him subsequently included the email to which it was attached in a bundle of documents which they filed with the FTT for use at the hearing. There is no communication on the FTT's file showing that the notice of hearing was sent to Mr Osagie's solicitors by the FTT itself, and it can only be concluded that he relayed it to the solicitors. Mr Osagie's solicitors completed a form stating that they and he would both attend the hearing.

16. The notice of hearing stated, incorrectly, that the hearing would be on 14 September 2020 but the covering email included the correct date, 14 September 2023. The confirmation of attendance form returned by the solicitors also recorded the correct hearing date. Mr Osagie claims not to have seen the notice of hearing and it has not been suggested on his behalf that the mistaken reference to 2020 rather than 2023 caused any relevant confusion.

17. Mr Osagie's solicitors filed their hearing bundle with the FTT at the beginning of June 2023 (the exact date is not apparent from the FTT file). It included a witness statement in which Mr Osagie disputed the application and exhibited a number of other documents, including a copy of the County Court judgment of 5 April 2023 for the return of the respondents' deposits. It did not include a copy of the Tomlin order recording the sum to be paid by the appellant in settlement of the respondents' claim for damages. The impression created by the filing of the hearing bundle is that Mr Osagie's solicitors were aware of the hearing and intended to participate in it.

18. In the event, neither Mr Osagie nor his solicitor attended the hearing on 14 September 2023. The FTT dealt with the consequences of their absence at the start of its decision, as follows:

> "The Applicants attended but the Respondent neither attended nor sent a representative. The Tribunal is satisfied that the Respondent was properly notified of the hearing date and proceeded in his absence."

19. The FTT then considered the evidence, including the evidence contained in Mr Osagie's own statement. It said (at paragraph 5) that, in the absence of the appellant, it would be unfair to take into account documents of which he had had no notice, so it refused to consider new material which the respondents wished to rely on. It was nevertheless able to make a finding that Mr Osagie had unlawfully deprived the respondents of their occupation of the property by locking them out, contrary to section 1(2) of the Protection from Eviction Act 1977. It was also satisfied that the events of 27 to 29 January 2023 constituted deliberate efforts by him to interfere with the respondents' peace and comfort with the intent that they should give up their

occupation of the property, contrary to section 1(3) and (3A) of the Protection from Eviction Act 1977.

20. The commission of these criminal offences by Mr Osagie gave the FTT power to make a rent repayment order, which it did, ordering reimbursement of the full amount of the rent paid by the respondents during the period of their occupation. It is clear from the decision that the FTT was aware that Mr Osagie had been ordered to return the deposits paid by the respondents and that it was aware also of the existence, but not the terms of the Tomlin order and so was unable to take them into account.

The appeal

21. Mr Osagie sought permission to appeal on a number of grounds, the first of which was that he had not been present at the hearing, because he claimed to have been unaware of it. He was refused permission by the FTT. In the refusal the FTT criticised his solicitors for not making enquiries about the date of the hearing, which may suggest that they did not appreciate that a copy of the notice of hearing was included in the hearing bundle filed by the same solicitors.

22. Mr Osagie instructed new solicitors and renewed his application for permission to appeal to this Tribunal. Under the heading "Right to a fair trial" his new solicitors pointed out that neither Mr Osagie nor any representative had been present at the hearing on 14 September 2023. They repeated the claim that he had been unaware of the hearing date:

> "It is [Mr Osagie's] position that he never received any notification of the hearing from the tribunal and that he was never informed of the hearing by his representatives either. The [appellant's] position is that his representatives (Church Street Solicitors) have confirmed to him that they too did not receive any notice of hearing."

Mr Osagie sought permission to appeal on the ground that the requirement in rule 34(b) of the FTT's Rules that it must consider it to be in the interests of justice before it could proceed to hear the application in his absence had not been addressed by the FTT at all.

23. After considering the grounds of appeal, and the way in which the FTT had dealt with the appellant's absence in its decision, I took the unusual course of requiring the Judge and Member who comprised the FTT panel at the hearing to provide their reasons for proceeding in the appellant's absence.

24. The power to require reasons is contained in rule 5(3)(n), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, which states that this Tribunal may:

> "require any person, body or other tribunal whose decision is the subject of proceedings before the Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before that person, body or tribunal."

25. The power is rule 5(3)(n) is rarely exercised. Usually the FTT's reasons are clear from its decision, but sometimes additional reasons may be required, and it is often preferable for reasons to be provided in a further decision of the FTT rather than for the parties to be put to the expense and delay of an appeal. That was recognised by the Court of Appeal in *English v Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605 where, at [25], Lord Phillips MR suggested the following approach as a means of avoiding unnecessary appeals on the ground of an absence of proper reasons:

> "If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings."

26. In this case I took the view that the appellant's sole arguable ground of appeal, namely that the FTT had failed to consider the interests of justice, might simply have been based on an inadvertent slip by the FTT in recording its decision to proceed with the hearing in his absence. It was incontrovertible that there were grounds for making a rent repayment order in a substantial sum, since Mr Osagie had acknowledged in the County Court order of 26 May 2023 that compensation was due to the respondents "for the illegal eviction and inconvenience caused by his action". If the FTT had in fact considered whether it was in the interests of justice to proceed with the hearing but had simply omitted to say so or to provide its reasons for coming to that conclusion, that deficiency could be cured by the provision of reasons at a later date in response to a request from this Tribunal.

27. Unfortunately, the panel's response to the Tribunal's request that they provide reasons for their decision made it necessary to grant permission to appeal. The FTT's additional reasons said only this:

> "We followed rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Full reasons for proceeding in the Respondent's absence were given in paragraph 3 of the decision (paragraph 5 is also relevant) and paragraphs 9 and 10 of the decision refusing permission to appeal."

28. This additional statement provided no comfort that the FTT's decision to proceed in the appellant's absence was made after consideration of the interests of justice; nor did it explain why the decision was made. Had the FTT limited itself to saying only that it had applied rule 34, even if it had not referred to the requirements of that rule, I would have been able to infer that it had considered that both conditions in the rule were satisfied. But, without even an acknowledgement of the relevant conditions, the FTT's bald statement that it followed the rule is fatally contradicted by its confirmation that its full reasons were given in paragraph 3 of the decision and in the refusal of permission to appeal. Paragraphs 3 and 5 of the decision itself say nothing about the interests of justice; it was that omission which prompted the ground of

appeal. Nor do paragraphs 9 and 10 of the refusal of permission to appeal dated 25 October. Paragraph 9 recites the appellant's explanation for his non-attendance without saying whether the FTT believed it or not and criticises his solicitors for not chasing for a hearing date when they did not receive one (without apparently appreciating that they had a copy of the notice of hearing). Paragraph 10 anticipates what might have happened if the appellant had attended but says nothing about the decision to proceed in his absence.

29. It was for these reasons that I granted permission to appeal subject to a condition that the full amount of the rent repayment order be paid by Mr Osagie to his own solicitor, who holds it on his undertaking not to release it otherwise that as directed by the Tribunal. That condition has been complied with.

30. For the same reasons I am forced to the conclusion that when the FTT decided to proceed with the hearing of the rent repayment application in the absence of Mr Osagie or his representative they failed to consider whether it was in the interests of justice to do so; alternatively, if they did consider whether that condition was satisfied, they failed to give any adequate explanation for their decision either in their original reasons or when prompted by this Tribunal's specific request. It follows that the decision to proceed was not a valid exercise of the FTT's discretion.

31. I should emphasise that there is no requirement for FTT decisions to record at length or in detail the reasons why it was considered to be in the interests of justice to proceed in the absence of a party. What is important is that both limbs of rule 34 are taken into account when a decision to proceed is made. While it would be better for that to be stated expressly when the decision is recorded, an omission to do so can readily be cured by the provision of specific reasons if the point is raised in an application to set aside the decision, or in an application for permission to appeal. In an extreme case, reasons can be supplied in response to a request from this Tribunal. The difficulty in this case is that the additional reasons supplied by the FTT assert that the panel's reasons had already been given in full.

Consequences

32. The next question is whether my conclusion that the FTT did not give proper consideration to whether to proceed in Mr Osagie's absence is enough to require that its decision be set aside and either redetermined or remitted to it for reconsideration.

33. This appeal is brought under section 11, Tribunals, Courts and Enforcement Act 2007 (the 2007 Act), which confers a right of appeal on any point of law. A serious procedural irregularity may amount to an error of law, but it is not every procedural irregularity, or every error of law, which requires that the decision of a lower tribunal be set aside. That is apparent from section 12(2), 2007 Act, which applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law. In that event, section 12(2)(a) provides that the Tribunal "may (but need not) set aside the decision of the First-tier Tribunal".

34. It is clear therefore that the Tribunal must consider the consequences of the error it has found before deciding whether or not to set aside the FTT's decision. The same requirement can be seen in the Civil Procedure Rules, concerning the power of an appeal court which finds that there has been a serious procedural irregularity; CPR 52.21(3)(b) provides that the appeal court will allow an appeal where the decision of the lower court was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court." The court must be satisfied not only of the seriousness of the irregularity, but also that it has caused the decision of the lower court to be unjust.

35. It is also relevant in this case that rule 51 of the FTT's Rules gives the FTT power to set aside a decision which has been made in the absence from a hearing of a party or their representative, but only if the FTT considers that it is in the interests of justice to do so.

36. Mr Osagie's case, as originally explained by his current solicitor, is that he was unaware of the hearing listed on 14 September and that his former solicitor had told him that they too had been unaware of the hearing. That may be what Mr Osagie has told his current solicitor but the contents of the FTT's file clearly establish that his version of events is untrue, or at best incomplete. A copy of the original notice of hearing addressed to Mr Osagie and sent to him by the FTT by email appears in the hearing bundle submitted by his former solicitors in June 2023. That fact was not apparent until after permission to appeal had been given and it was not addressed by Mr Osagie's solicitors in their submissions in support of the appeal (they were not instructed at the time the bundle was filed and I infer that they have not seen their predecessor's file or the original hearing bundle). I therefore considered it necessary to give Mr Osagie and his current solicitors an opportunity to deal with the inconsistency and they were notified of the contents of the FTT's file, including the email of 4 May 2023 to Mr Osagie and the confirmation from his previous solicitors that he and they would attend the hearing.

37. Mr Osagie's current solicitors took instructions from him and in a response provided on 5 September they acknowledged that their predecessors certainly appear to have been aware of the hearing but reiterated their instruction from Mr Osagie that he was not. They did not comment directly on the email to their client attaching the notice of hearing and focussed instead on the confirmation of attendance form stating an intention to attend the hearing on 14 September 2023 and on the fact that it had not been signed by Mr Osagie.

38. The only possible conclusion which can be drawn from the hearing bundle filed by Mr Osagie's former solicitors is that he received the notice of hearing and passed it on to them. The original expectation of his solicitors was that they would be instructed to attend and that Mr Osagie would also attend, as they informed the FTT. What happened after that is a matter of speculation but, having given Mr Osagie the opportunity to comment, and having received no satisfactory explanation, there is no injustice to him in this Tribunal proceeding on the basis that he received the notice of hearing and (as is now acknowledged) his solicitors were aware of it.

39. In his statement in response to the application (which bears a statement of truth) Mr Osagie confirmed that he was the respondents' landlord. He did not directly challenge their version of events concerning the attempted evictions; his explanation was that he had believed the respondents had moved out on 25 January before his "maintenance man" had cleared the premises. As the FTT found, that account was simply not credible as all of the respondents' belongings remained in the property, nor was it consistent with the account he gave to the police that the respondents were squatters whom he had never seen before (a version he later retracted).

40. The other matter Mr Osagie raised in his original witness statement concerned the ground floor of the property which he described as a studio flat and which he said he reserved for himself and guests. The FTT preferred the respondents' evidence that Mr Osagie had never resided in the building, but even if they had reached the opposite conclusion, it would not have affected the outcome of the application. The number of persons in occupation was not an element of the offences which the FTT found proven. The offences of unlawful eviction and interference with the respondents' comfort with the intent that they should give up their occupation of the property would have been proven on the facts even if the appellant had resided in the building.

41. In view of the admission recorded in the order of the County Court there is simply no possibility that the FTT would have reached a different conclusion about the commission of the two offences, and therefore about its jurisdiction to make a rent repayment order if Mr Osagie had attended and given evidence. Given the seriousness of the offences and the fact that the respondents moved out as a result of Mr Osagie's conduct, there is no possibility that the FTT would have decided that it was not appropriate to make a rent repayment order. The only possible issue could have been the quantum of the order.

42. The facts about the illegal eviction recorded in the FTT's decision, and the agreed payment of compensation and costs which ended the County Court proceedings, demonstrate that Mr Osagie is prepared to trample over the rights of others if he considers it to be to his advantage. Had he taken the opportunity to attend the hearing it is nevertheless possible that he might have persuaded the FTT to order repayment of a lesser sum (perhaps taking into account the compensation which had already been paid). But there is no guarantee that he would have secured a better outcome and the FTT would certainly have been entitled to order repayment of the full amount of the rent even having regard to the compensation already paid by Mr Osagie.

43. In my judgment the interests of justice do not require that the FTT's decision be set aside and redetermined. There was no jurisdictional obstacle to the making of the order, and the possibility that a lesser penalty might have been imposed was foregone by Mr Osagie when, for whatever reason, he and his solicitors failed to attend the hearing of which they had been given proper notice.

Disposal

44. For these reasons, although the FTT's approach was flawed by reason of a serious procedural irregularity, the appeal is dismissed.

45. The funds held by the appellant's solicitor, Mr Khan, must now be released to the respondents in accordance with his undertaking to the Tribunal. Any interest which has accrued while the funds have been held should be dealt with as directed by Mr Osagie.

Martin Rodger KC
Deputy Chamber President

18 September 2024