

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2015] UKUT 0588 (LC)

UTLC Case Number: RAP/19/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LANDLORD AND TENANT – Rent Determination – first-tier tribunal determining rent for flat on reference under Housing Act 1988 section 13 by applying criteria set out in Housing Act 1988 section 14 – whether first-tier tribunal erred in law – whether tenancy a protected or statutory tenancy governed by the Rent Act 1977 rather than an assured tenancy to which section 14 applied – applicability of Housing Act 1988 section 34 (1) (b)*

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S. 11 OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BETWEEN

GRAHAM FRANCIS BACON

Appellant

and

MOUNTVIEW ESTATES PLC

Respondent

Re: Basement Flat,  
15a Birchington Road,  
London  
NW6 4LL

Before: His Honour Judge David Hodge QC

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

on

20 October 2015

The Appellant appeared in person

The Respondent did not appear and was not represented

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The following cases are referred to in this decision:

*Railtrack Plc v Guinness Ltd* [2003] EWCA Civ 188

*Secretarial & Nominee Co Ltd v Thomas* [2005] EWCA Civ 1008, [2005] 3 EGLR 37

No cases were cited in argument

## DECISION

### Introduction

1. This is a tenant's appeal from a decision of the First-Tier Tribunal (Property Chamber) dated 21 March 2014 by which it determined that the market rent for the Basement Flat, 15a Birchington Road, London NW6 4LL was £210 per week. By a notice of variation dated 6 September 2013 the then landlord of the property (which has since sold its reversion to the Respondent to this appeal) had notified the tenant that it was proposing a new rent of £350 per week in place of the existing rent of £150 per week. The tenant had referred the landlord's notice to the First-Tier Tribunal (FTT) under section 13 of the Housing Act 1988 by an application form received by the FTT on 17 October 2013. At the hearing before the FTT the tenant attended in person and represented himself. At paragraph 15 of its decision the FTT recorded that it was satisfied that the application was a valid application made in respect of an assured tenancy which the FTT had jurisdiction to determine. In reaching its decision as to the market rent for the flat, the FTT expressly applied the rules governing the determination of the market rent contained in section 14 of the Housing Act 1988.

2. By a decision dated 23 October 2014 the Deputy President (Martin Rodger QC) granted the tenant permission to appeal. He noted that the right of appeal against decisions of the FTT in relation to fair rents under the Housing Act 1988 and the Rent Act 1977 arises under section 11 of the Tribunals, Courts and Enforcement Act 2007, which confers a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by" the FTT. The Deputy President observed that in appeals from tribunals the concept of an error or a point of law has been widely interpreted, citing observations of Carnwath LJ in *Railtrack Plc v Guinness Ltd* [2003] EWCA Civ 188 at [51] where it was stated in terms that an appeal on law might, in appropriate cases, be available where a decision had been reached upon an incorrect basis of fact due to misunderstanding or ignorance.

3. In his decision, the Deputy President noted that the sole ground of appeal was that the Appellant's tenancy was not an assured tenancy under the Housing Act 1988 but was a regulated tenancy under the Rent Act 1977, to which different provisions applied if a landlord wished to secure an increase in rent. The Deputy President recorded that it was clear from the FTT's reasons for its decision that the point now taken by the Appellant had not been mentioned at the hearing before the FTT, and that there had been no dispute between the parties concerning the nature of the Appellant's tenancy. The Deputy President noted that the evidence now relied upon by the Appellant, which had not been before the FTT, was that he had moved to his current address in May 1993 from premises which he had occupied as tenant of the same landlord since 1983. He had produced a rent book recording that his tenancy of his current premises had commenced in May 1993, the printed part of which referred to the tenancy as one protected by the Rent Act 1977. The effect of the Housing Act 1988, section 34 (1) was that a tenancy entered into after the commencement of the relevant Part of the Act on 15 January 1989 could not be a protected tenancy under the Rent Act 1977 except in defined exceptional circumstances, one of which might

be applicable in the present case if the facts were as they were now said to be by the Appellant. Section 34 (1) (b) has the effect that a tenancy created after the relevant date may be a protected tenancy if it was granted to a person who, immediately before the tenancy was granted, was a protected or statutory tenant and it was so granted by a person who at that time was the landlord under the protected or statutory tenancy. If the Appellant's tenancy was one to which the Rent Act 1977 applied, the FTT had had no jurisdiction to determine a rent for it under section 13 of the Housing Act 1988. The Deputy President was satisfied that, despite the apparent consensus before the FTT, it was arguable that its decision was wrong in law because (assuming the facts to be as they were stated by the Appellant), it had had no jurisdiction to determine a rent under the Housing Act 1988. On the same assumption, the FTT's decision might be capable of being set aside as having been made in ignorance of a material fact. It was therefore appropriate to grant permission to appeal on the single issue of whether the FTT had had the necessary jurisdiction to consider the application under section 13 of the Housing Act 1988. The Deputy President directed that the application for permission to appeal, and an affidavit which the Appellant had sworn on 17 October 2014, should stand as his notice of appeal; and that the appeal would be determined by the Upper Tribunal as a rehearing on the issue of jurisdiction.

4. The Respondent to this appeal, Mountview Estates Plc, wrote to the Upper Tribunal on 29 May 2015 stating that it had purchased the property in July 2014 on the basis that the Appellant was an assured tenant. It was not aware of any of the history concerning the status of the Appellant's tenancy and unfortunately it felt that there was nothing it could add to the case.

5. The hearing of the appeal took place on Tuesday 20 October 2015. The Appellant appeared in person. As it had previously indicated, the Respondent did not attend the hearing, nor did it submit any documents to the Upper Tribunal. Prior to the hearing the Appellant had submitted by email a "skeletal argument" which included the following assertions:

"1. On the March 19th 1983 I moved into 84 Kingsgate Road and became a tenant of Mr John Best.

2. I had a series of tenancies with John Best in the 1980's/90's and each time I moved I handed in the old Rent Book and received a new one (i.e. Tenancy agreement signed by landlord) from John Best.

3. In early 1993 I was offered the garden basement flat at 15a Birchington Road, which I took possession of in early 1993. John Best then gave me the tenancy agreement, signed, dated and in his words: 'You've been a tenant of mine long enough and you are now a statutory regulated tenant. Here is my contract with you as long as you pay the rent.' Until his death in 2009 I paid my rent as my part of the contract and he kept his side of the contract."

At the outset of the hearing the Appellant duly took the oath and therefore all that he told me during the course of the hearing was evidence in the case. I found the Appellant to be a well-mannered, careful, credible, truthful and reliable witness whose evidence I accept in its entirety. The Appellant's evidence was consistent with what he had written in his "skeletal argument". I make the following findings of fact.

6. The Appellant first became a tenant of Mr John Best at 84 Kingsgate Road on 19 March 1983. (The Appellant said that he remembered this date because it was St Patrick's Day and John Best had joked that the Appellant would be the only Englishman in Kilburn. Since St Patrick's Day is 17 March, the Appellant's recollection may be incorrect by a couple of days. I note that in his affidavit he gives the date of the commencement of his first tenancy as March 17 1983.) Thereafter, the Appellant remained a residential tenant of John Best until the latter's death in September 2009. The Appellant lived for a time as John Best's tenant at 91 Sumatra Road. Immediately before he moved in to his present flat, he was sharing a flat with Mr Frank Broderick at 21A Birchington Road, paying half of the total rent to John Best, who was their landlord. At all times up to, and immediately before, the Appellant's move to his present flat in March 1993, the Appellant was John Best's periodic regulated tenant. The Appellant had moved to the flat because it had a garden for his dog. The flat had required some work to be done to it because it had been occupied by squatters. This the Appellant had duly carried out in return for a reduced rent initially of £30 per week and an allowance from John Best for the cost of materials. As from 21 May 1993, the Appellant's rent for the flat had increased by agreement to £70 per week, as stated in the rent book. (The rent was later increased, by agreement with John Best, to £100 per week. Later still, his nephew, Mr Richard Best, unilaterally increased the rent to £150. This resulted in a reference to the London Rent Assessment Panel, which declined jurisdiction, apparently because insufficient notice of the increase in rent had been given to the Appellant, although the position is not entirely clear because the Appellant only had the first page of the Panel's decision letter, issued on 14 May 2009. The Appellant subsequently agreed to pay the £150 per week in order to avoid any further harassment on the part of Richard Best; but the Appellant told me that he had never accepted that he was anything other than a regulated tenant of the flat, paying a rent of £150 per week.) The Appellant produced to me the original of the four cover pages of the rent book which are exhibited to his affidavit. He told me that all of the writing on these pages was John Best's. I noted that the telephone number on the rent book (071-624-4076) was (apart from the code 071) the same as that on the headed notepaper of John Best & Co Estate Agents used in a letter which the Appellant showed to me dated 9 April 2009. It was apparent from my inspection of the original rent book that the pages inside the book recording the payment of rent had been removed (because there were indications that two staples had been removed). At my request, immediately after the hearing the Appellant sent the Upper Tribunal a photocopy of the missing pages, referring to rental payments of £70 per week for the period 21 May 1993 to 18 March 1994. In his covering letter, the Appellant stated that after John Best's nephew, Richard Best, had taken the rent book for 5 days, and the Appellant had had to ask John Best for its return, the Appellant had always paid his rent by direct debit. (The Appellant had referred to making payments by direct debit at the hearing.) The rent book contains printed information for the tenant, including (at para 8) the statement that: "You are protected by the Rent Act 1977 and known as a 'regulated tenant'." At the hearing the Appellant told me that he had originally purchased a rent book for an assured tenancy from W H Smith but that John Best had told the Appellant that it was not the right type of rent book and had instructed the Appellant to go to Boots the Chemist and get this particular rent book because it contained the statement at para 8. John Best had "given" the rent book to the Appellant after he had been living in the flat for a couple of months doing it up, and he had told the Appellant that it was his "contract". I accept that the rent book is a genuine document. I acknowledge that parties cannot "contract-in" to the protection of the Rent Act 1977, either by agreement or estoppel; but the Appellant's evidence shows that John Best understood that he remained a regulated tenant. At the hearing the Appellant also produced a copy of a typewritten letter dated 9 February 2005 which John Best had written to Streeter & Marshall, a firm of solicitors practising in Purley, referring to a compulsory purchase of properties (including 91 Sumatra Road) going back to 1982 and 1984. The letter included the statement: "In number 91

Sumatra Road was tenant Mr Graham Bacon who is still wiyh [sic] me and would be [a] witness.” The Appellant explained how a copy of this letter had come into his possession when he had been summoned by John Best to an appointment with the solicitor on the afternoon of Friday 11 March 2005.

7. I find that immediately before the Appellant was granted his tenancy of the basement flat at 15a Birchington Road by John Best in or about March 1993, the Appellant was a protected or statutory tenant of 21A Birchington Road and that his landlord there was the same John Best. Indeed, I find that the Appellant had enjoyed a continuous series of periodic or statutory tenancies of residential properties, with John Best acting as his landlord, ever since the Appellant had first taken the tenancy of 84 Kingsgate Road from John Best on or about 17 March 1983. It follows that by the operation of section 34 (1) (b) of the Housing Act 1988, the Appellant’s tenancy is a regulated tenancy under the Rent Act 1977 and not an assured tenancy under the Housing Act 1988. As a result, the FTT had no jurisdiction to determine a rent for the Appellant’s flat under section 13 of the Housing Act 1988. The FTT also erred in law in applying the rules governing a determination of market rent contained in section 14 of the 1988 Act. It therefore reached its decision upon an incorrect basis of fact due to its ignorance of the true status of the Appellant’s tenancy. I am satisfied that this constituted an error of law.

8. At one stage, I confess to having been troubled by the fact that immediately before he was granted a tenancy of his present flat, the Appellant had been occupying another of John Best’s flats (at 21A Birchington Road) with another tenant of John Best (Frank Broderick). The Appellant did not venture any details of the terms of their occupation beyond the fact that he had continued to pay rent to John Best. However, there would seem to be only two possible analyses of the position, both of which lead to the same result, which is that the Appellant continued to enjoy the status of a regulated tenant by virtue of section 34 (1) (b) of the Housing Act 1988. The first is that the Appellant enjoyed a tenancy of the actual bedroom which he occupied at 21A and shared other essential living accommodation with Mr Broderick. On this analysis, the Appellant’s separate accommodation would be deemed (by section 21 (1) of the Rent Act 1977) to be a dwellinghouse let on a protected or statutory tenancy. Alternatively, if John Best had granted a single tenancy of the whole of 21A jointly to the Appellant and Mr Broderick, then since the Appellant was already a Rent Act protected tenant of John Best, the joint tenancy would have attracted the operation of section 34 (1) (b), irrespective of the previous status of any prior tenancy of Mr Broderick. That conclusion is supported by the analysis of the Court of Appeal in the case of *Secretarial & Nominee Co Ltd v Thomas* [2005] EWCA Civ 1008, [2005] 3 EGLR 37 at [18], [26] and [31]. It is also consistent with the policy which underlies the statutory exception created by section 34 (1) (b) which (as Rix LJ explained at [1]) was designed to ensure that existing protected and statutory tenants did not become worse off than they would have been under the Rent Act 1977 should they agree a new tenancy with their landlord after the commencement of the Housing Act 1988. Section 34 (1) (b) is engaged even where the new tenancy is not of the same premises as the former protected or statutory tenancy.

9. For these reasons I allow the appeal and set aside the FTT’s determination of a market rent for the property of £210 per week.

**Decision:**

10. The appeal is allowed.

11. The First-Tier Tribunal's determination of a market rent for the property of £210 per week is set aside.

*David R. Hodge*

**His Honour Judge David Hodge QC**

**28 October 2015**