Neutral Citation Number: [2024] UKUT 17 (LC)

Case No: LC-2023-326

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) OR
FTT Ref: LON/00AW/HMF/2022/0070

Royal Courts of Justice
16 January 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – criteria for identifying a "self contained flat" – whether building was a house in multiple occupation – adequacy of reasons

BETWEEN:

JAMES BARKER

Applicant

-and-

MISS CHANTELLE KIRAN SHOKAR

Respondent

14 Bassett Road,
London,
W10 6JJ

Upper Tribunal Judge Elizabeth Cooke
16 January 2024

Decision date: 17 January 2024

Mr Julian Hunt for the appellant on a direct access basis

The following case is referred to in this decision:

Opara v Olasemo [2020] UKUT 96 (LC)

Introduction

1. This is an appeal from a rent repayment order made by the First-tier Tribunal ("the FTT") against the appellant Mr Barker. He was represented by Mr Julian Hunt of counsel, who also appeared before the FTT, and I am grateful to him. The respondent Ms Shokar filed a respondent's notice and grounds of opposition, but shortly before the hearing withdrew from participation in the appeal.

The background in summary

2. Part 2 of the Housing Act 2004 provides that certain houses in multiple occupation ("HMOs") have to be licensed, and section 72 of the 2004 Act provides that it is an offence to manage or be in control of an HMO that is required to be licensed and is not licensed. That offence is one of those specified in section 40 of the Housing and Planning Act 2016, which means that the FTT may make a rent repayment order in favour of a tenant against a landlord if it is satisfied beyond reasonable doubt that the offence has been committed during the period of one year before the tenant's application.

3. The property in question in this appeal is 14 Bassett Road, London W10, described by the FTT as a "large rambling London townhouse". It is Mr Barker's home and his mother's, where she has lived since 1980, and it contains four rooms which are rented out to individuals. Ms Shokar rented a room in the house from August 2020 to February 2022. Later she applied to the FTT for a rent repayment order on the ground that the house was required to be licensed as an HMO under the Housing Act 2004 and had not been.

4. The house was described by both parties to the FTT as follows. On the ground floor to the right of the entrance is a large room which I am going to call the "Ground Floor Room" by way of neutral description, which is occupied by Mr Barker and his mother. To the left is a library, and to the rear is a kitchen. Four rooms on the first and second floor are let by Mr Barker to individual occupiers; on the first floor is a shared bathroom and on the second floor there is also a utility room and a guest bedroom. The occupiers of the four let rooms share the first floor bathroom and the ground floor kitchen. There is a self-contained flat in the basement.

5. Mr Barker and his mother Mrs Barker made witness statements explaining that the Ground Floor Room has its own lockable door and is a lounge with a small bathroom and kitchen area at the rear. There is a bed on the ground level for Mrs Barker and a mezzanine area which Mrs Barker described as the "second bedroom" where Mr Barker sleeps (although he said he occasionally sleeps in the library).

6. Before the FTT Mr Barker conceded that he was Ms Shokar's landlord, that if the property was an HMO he was the person managing or in control of it, and that he did not have an HMO licence for the property. The FTT decided that the property was an HMO that required to be licensed, on the basis of the number of occupants in it during the relevant 12-month period which it decided was 21 February 2021 to 21 February 2022, and it made a rent repayment order against Mr Barker. Mr Barker appeals, with permission from this Tribunal, on two grounds:

    a. That the Ground Floor Room is a self-contained flat and its occupants therefore do not count towards the number of occupants to be counted in determining whether a licence is needed, so that even if the rest of the house is an HMO it did

not require a licence because at no point during the relevant period were there more than four occupants in the rest of the house.

b. If the appeal fails on the first ground, the second ground is that the FTT did not give sufficient reasons for its calculation of the number of occupants occupying the building as their only or main residence (as the statute requires for the definition of an HMO to be met).

7. To understand the appeal we have to look in more detail at the provisions of the 2004 Act.

The legal provisions in more detail

8. Not all HMOs have to be licensed; section 55(2) of the 2004 Act explains that Part 2 applies:

> "to the following HMOs in the case of each local housing authority–
> (a) any HMO in the authority's district which falls within any prescribed description of HMO, and
> (b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation."

9. So in order to determine whether a building needs an HMO licence, it is necessary to determine first whether it is an HMO and second whether either of the conditions in section 55(2)(b) applies.

10. As to that second question, it was common ground before the FTT that condition (b) does not apply because at the relevant period the local housing authority had not designated the relevant area as being subject to additional licensing (although it has done so since). As to condition (a), the prescribed description is to be found in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions (England) Order 2018, which provides that a licence is required only if the HMO is occupied by five or more persons.

11. Turning back to the first question, section 77 defines an HMO as a property that meets one of the tests set out in sections 254 to 259, and it is not in dispute that the relevant test in the present case is the "standard test" set out in section 254(2):

> "(2) A building or a part of a building meets the standard test if–
> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

12. Section 254 (8) provides, so far as relevant:

> "(8) In this section–
> *"basic amenities"* means–
> (a) a toilet,
> (b) personal washing facilities, or
> (c) cooking facilities;
> ...
> *"self-contained flat"* means a separate set of premises (whether or not on the same floor)–
> (a) which forms part of a building;
> (b) either the whole or a material part of which lies above or below some other part of the building; and
> (c) in which all three basic amenities are available for the exclusive use of its occupants."

13. Mr Barker told the FTT that the Ground Floor Room has a toilet, personal washing facilities and cooking facilities, and Mr Hunt argued that the Ground Floor Room is a self-contained flat within the meaning of section 254(8) (being part of the building and directly below the first floor). If that is correct then even if the rest of the house is an HMO, Ground Floor Room would not be part of that HMO – in exactly the same way as the admittedly self-contained basement flat was left out of account. And therefore even if the rest of the house was an HMO, it cannot have required a licence during the relevant period because there were never more than four occupants in the rest of the house during that period. The FTT found against Mr Barker on that point, and the first ground of appeal is that it was wrong to do so.

14. The second ground flows from section 254(c); the argument is that the FTT made no express finding that the four occupants of the let rooms were using the premises as their only or main residence, without making findings of fact to that effect, despite the fact that none of them gave evidence at the hearing and that Mr Barker's evidence was that three of the occupiers stayed for such short periods (two months or less) that the rented room cannot have been their only or main residence. Yet the house was found to be an HMO, and so the FTT must have taken the view that the occupants were all using the accommodation as their only or main residence, but how it came to that view was unexplained.

The evidence given to the FTT, and the FTT's decision

15. Ms Shokar was the applicant in the FTT. Her case was that for much of the period of time in question all four rooms were let, and that therefore there were five or more people living in the house including Mr Barker and his mother. In her statement of case, which is before the Tribunal in the appeal bundle, she addressed the argument that the Ground Floor Room was a self-contained flat by saying that it had not been self-contained in the 1990s, that it was not separately assessed for council tax, and that Mrs Barker shared the ground floor kitchen with the other residents.

16. Mr Barker's case was that the Ground Floor Room was a self-contained flat, as set out in paragraph 5 above. In his witness statement he produced a plan showing that it had a toilet, personal washing facilities and cooking facilities. In his skeleton argument Mr Hunt

set out section 254(8) and argued that in light of its having these amenities for the exclusive use of its occupants it met the definition in section 254(8) and was therefore not part of an HMO under the standard test in light of section 254(2)(a).

17. This is what the FTT said in its decision about the Ground Floor Room:

> "18. … The Tribunal did have the benefit of the site visit. The room is a large high ceiling space with a converted area to the rear that contained a small kitchen type space and a toilet and shower area. Above it was a small sleeping area formed from a platform above the kitchen and shower spaces. The door to the room was an internal wooden panelled door that matched the other internal doors within the building. The Tribunal noted that there was no Chubb or Ingersoll lock on the door but there was an original old-style deadlock. There did not appear to be any fire safety work made to this door.
>
> 19. The Tribunal heard oral evidence from the respondent who asserted that this room was a self-contained separate unit within the building. The Tribunal was not persuaded of this. It seemed to the Tribunal that this was merely a room within the building that formed part of it, albeit with some limited facilities to the rear including a rather restricted sleeping area. Accordingly, the Tribunal from its own observations from the site visit was of the view that this room was part of the whole building and as such occupants would be included in the calculation of persons for the purposes of calculating whether or not there was an HMO at the property."

18. As to the occupancy of the rest of the house, Mr Barker set out in his witness statement a schedule of the occupancy of the four rooms. On his evidence there was a succession of occupiers during the relevant period, nine in all but never more than four at once, and some of them stayed only a month or two. Mr Hunt in his skeleton argument before the FTT analysed the relevant period in detail and argued that residents who stayed there only for a month or two were not using their room as their only or main residence.

19. Some of those occupiers gave witness statements, but non attended the hearing before the FTT and so none could be cross-examined.

20. As to the occupancy of the house, the FTT said this:

> "20. … The Tribunal turned to the schedule prepared by the respondent that he included in his evidence to show the levels of occupancy during the period the claim. On his calculations, which the Tribunal accept, it would appear that for some 40 weeks of that period or 76% of the time there were sufficient numbers including Mr and Mrs Barker to take them up to or over the 5-person threshold. To that end the Tribunal is satisfied that for the 40 weeks mentioned above there was an HMO and this was not licensed and as such the respondent has committed the offence set out above.

21. Having determined that the house was an HMO with five or more occupants during the relevant period, the FTT then went on to decide to make a rent repayment order in respect of those 40 weeks and made an order that Mr Barker repay £3,750 to Ms Shokar.

The appeal: ground 1

22. The FTT's decision that the Ground Floor Room was not a self-contained flat, quoted at paragraph 17 above, appears the to rest on the "limited" nature of the facilities to the rear, the "rather restricted" nature of the sleeping area, and perhaps the absence of a Chubb or Ingersoll lock. There is no mention of the definition in section 254(8) nor any analysis of the facilities to ascertain whether that definition was satisfied. It is not possible to understand why the nature of the lock might be relevant, nor why the sleeping accommodation was relevant. Mr Hunt observed at the appeal hearing that there was no mention of the type of lock at the hearing, so that he was not aware that it was regarded by the FTT as significant.

23. It is troubling that despite having its attention drawn to section 254(8) in Mr Hunt's skeleton argument and, Mr Hunt told me, in his closing address, the FTT made no mention of that provision. Nor did it do so in its refusal of permission to appeal, again despite the provision being set out in the grounds of appeal. It is not possible to understand from the FTT's decision why it took the view that the Ground Floor Room did not satisfy the statutory definition of a "self-contained flat" – or why, if that definition was satisfied, that did not matter. The respondent in her grounds of opposition did not offer any assistance on this point.

24. Inevitably the FTT's decision has to be set aside on the basis that it failed to take into account a crucially relevant matter, namely the statutory definition of a self-contained flat.

25. On the basis of the evidence given to the FTT I am able to substitute the Tribunal's own decision on this point.

26. Mr Barker's evidence to the FTT, as I have said, included a plan which indicated that the three "basic amenities" were present, namely cooking facilities, a toilet, and cooking facilities, and that the Ground Floor Room formed part of the building and was part of the ground floor, underneath the first floor (see the terms of section 254(8), set out at paragraph 11 above. The FTT made no finding that that evidence was not true. Mrs Barker also gave evidence that the Ground Floor Room was self-contained, and her evidence was not challenged at the hearing before the FTT. Ms Shokar's witness statement said that "if there was a kitchen in the flat" it must have been added since she had left the property; her evidence was that Mr Barker and Mrs Barker used the shared kitchen, It does not appear from Ms Shokar's witness statement that she had been in the Ground Floor Room or was able to say from her own observation whether any of the "basic facilities" was present.

27. Accordingly the weight of the evidence in the FTT, and in particular Mrs Barker's entirely unchallenged evidence, was that the three basic facilities were present in the Ground Floor Room and that the definition at section 254(8) was satisfied. It may be that Mr Barker and Mrs Barker also used the shared kitchen, but that makes no difference to the status of the Ground Floor Room. Whether or not the Ground Floor Room was separately assessed for council tax is also irrelevant.

28. The Tribunal therefore substitutes its own decision that the Ground Floor Room was a self-contained flat as defined in section 254(8). Section 254(2)(a) provides that an HMO must be "one or more units of living accommodation not consisting of a self-contained flat or flats", and therefore if the rest of the house is an HMO the Ground Floor Room is not part of that HMO. Its occupants cannot count towards the total required by the 2018 regulations in determining whether a licence was required. A licence was therefore not

required for the house (even if it was an HMO), Mr Barker committed no offence, and the application for a rent repayment order is dismissed.

The appeal: ground 2

29. It is therefore strictly unnecessary to decide the second ground of appeal, which goes to the question whether or not the rest of the house was an HMO. But because of the point that it raises it will be helpful for me to provide a decision on it.

30. One of the requirements of section 254(2), within the "standard test" for whether a property is an HMO, is that the occupants must use the property as their only or main residence (section 254(b)). In many cases this is an easy inference to draw, even where no specific evidence is given on the point; *Opara v Olasemo* [2020] UKUT 96 (LC) was such a case. The present case was not. Mr Barker's evidence in his witness statement was that while there were for much of the relevant period four people living in the rented rooms, some of them stayed for such a short period that it did not appear that this was their only or main residence. In some cases discussions he had with them indicated as much. The burden was on Ms Shokar to prove, to the criminal standard, that the people on whose occupancy she relied had used their rented room as their only or main residence. This was not an obvious and unchallenged inference from the evidence, and it was not open to the FTT to ignore the fact that it was an issue between the parties.

31. Nevertheless the FTT made no finding of fact on this issue, apparently taking the matter as read and making no mention of the point. The FTT again ignored a relevant consideration, namely the dispute about the status of the occupation of some of the occupiers. Ground 2 succeeds, and the FTT's decision that the property was an HMO would have been set aside on this ground had it not already been set aside on ground 1. As it is, the decision has already been set aside and re-made and there is nothing further for the Tribunal to decide.

Conclusion

32. The appeal succeeds on both grounds. The Tribunal has substituted its own decision: Ms Shokar's application for a rent repayment order is dismissed.

Upper Tribunal Judge Elizabeth Cooke

17 January 2024

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.