Neutral Citation Number: [2024] UKUT 403 (LC)

Case No: LC-2024-571

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

REF: CHI/00HE/HNA/2023/0030

12 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – operation of house in multiple occupation without a licence - need to prove the commission of the offence beyond reasonable doubt – whether the First-tier Tribunal had sufficient evidence to find that all five occupants lived at the property as their sole or main residence.

BETWEEN:

RICHARD O'HALLORAN

Appellant

-and-

CORNWALL COUNCIL

Respondent

22 Trevail Way,
St Austell,
Cornwall,
PL25 4QT

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations

Mr Karol Hart of Freemans Solicitors LLP, for the appellant
Cornwall Council's Legal Services department, for the respondent

The following cases were referred to in this decision:

Camfield v Uyiekpen [2022] UKUT 2324 (LC)
Opara v Olasemo [2020] UKUT 96 (LC)

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") to confirm a civil penalty imposed upon the appellant for the offence of managing or being in control of a house in multiple occupation which was required to be licensed and was not licensed. The sole ground of appeal is that there was insufficient evidence before the FTT for it to have concluded that the offence had been committed.

2. The appeal has been decided under the Tribunal's written representations procedure; written representations for the appellant have been provided by Mr Karol Hart of Freemans Solicitors LLP, and for the respondent local authority by its legal department.

The legal background

3. The Housing Act 2004 established a licensing regime for houses in multiple occupation ("HMOs"). There are several definitions of an HMO, and the one relevant for the present appeal is the "standard test" in section 254 of the 2004 Act, which describes a house where the occupants pay rent and share basic amenities (such as the kitchen or bathroom) and in particular where:

> "(2)…
> (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);

4. When an HMO that meets the standard test is occupied by five or more persons in two or more separate households then the HMO requires a licence (article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Regulation 2018).

5. Section 249A of the Housing Act 2004 enables a local housing authority to impose a civil penalty upon a person if it is satisfied beyond reasonable doubt that he or she has committed any of the offences listed in that section, as an alternative to prosecution. Among the offences listed is the offence under section 72(1) of the 2004 Act of managing or being in control of a house in multiple occupation that requires a licence and does not have one. Paragraph 10 of Schedule 13A to the 2004 Act makes provision for appeal to the First-tier Tribunal against the decision to impose a civil penalty and the amount of that penalty. The appeal is a re-hearing and the FTT is to make its own decision whether to impose a penalty and about the amount of the penalty; therefore the FTT itself must be satisfied, again to the criminal standard of proof, that the offence has been committed.

6. For a civil penalty to be imposed in relation to the section 72(1) offence it is not necessary for the offence to have been committed over any particular period. It must simply have been committed on the date on which the local housing authority stated, in its notice of intention to impose a financial penalty, that it was being committed, and of course on an appeal the FTT too has to be sure that the offence was committed on that date.

The factual background and the decision in the FTT

7. The appellant is the registered proprietor of 22 Trevail Way, St Austell, Cornwall. It was purchased as an investment for him in 2006 while he was serving in the Royal Marines along with other properties; his father let the properties and managed them for him. 22 Trevail Way had five bedrooms and a shared kitchen and bathrooms, and the rooms were let to individuals who did not form a single household. In October 2022 the respondent local housing authority served on the appellant a notice of intention to impose a civil penalty on the basis that he had committed the offence created by section 72(1) of the 2004 Act on 7 July 2022. The respondent later served a final notice imposing a penalty of £15,000.

8. The appellant appealed to the FTT on a number of grounds, one of which was that on 7 July 2022 there were only 4 people living at the property; another was that one of the residents, Ms Doris Anyanwu, did not live there as her sole or main residence. The FTT heard evidence and found that there were five people living at the property on the relevant date as their sole or main residence, rejected a defence of reasonable excuse, and imposed a penalty of £7,500.

The appeal

9. The appellant has permission to appeal, granted by this Tribunal, on the following single ground:

> "It is arguable that the evidence provided to the FTT was insufficient to support the conclusion that five individuals occupied the premises as their only or main residence. In particular, it is not clear what evidence, if any, there was about the occupancy of Doris Anyanwu, who was not seen or interviewed by the Council's officers. The evidence of Mrs Amanda Evans, who spoke to the other occupiers, and who formed the impression from her conversations with them that they resided in the property as their only or main residence, was sufficient to support the FTT's conclusion about four of the five occupiers, but it was necessary for there to have been evidence from which a finding or inference could be drawn in relation to all five occupants."

10. So there is no appeal against the finding that there were five people living at the property on 7 July 2022. The issue is whether there was sufficient evidence for the FTT to have found that Doris Anyanwu occupied the property as her only or main residence on the relevant date. The appellant's argument rests on the evidence presented by the respondent to the FTT, which he says was insufficient to. The respondent has filed a respondent's notice but has not advanced any argument in the appeal beyond expressing its support of the FTT's decision.

11. The evidence given for the respondent about Doris Anyanwu was as follows:

    a. Amanda Evans is a Private Sector Housing Officer for the respondent. In her witness statement she explained that she visited the property in January 2022 after one of the occupiers contacted the respondent for advice about hearing and electricity. She was told that five people were living there;

Doris Anyanwu was not one of them. She then wrote to the appellant and his father asking for information about the property and its occupiers. In May 2022 she was told by one of the occupiers that there were then only four occupiers in the property and so took no further action. In June she received another complaint about the property and so she visited on 7 Jully 2022. She spoke to three occupiers and was told by them that there were two others, one being Steven Lewis and the other known to the occupiers as Doris. She knocked on Doris' door but there was no answer. In its decision the FTT said that Ms Evans explained that when there was no answer from Doris' room "she didn't push it as did not want her to feel harassed."

b. After the visit Ms Evans contacted the National Anti-Fraud Network and was told that there were "approximately 51 persons associated with the address", one of whom was a Doris Anyanwu.

c. With Amanda Evans at the property on 7th July was her manager Stuart Kenney; he too saw that there were five bedrooms and was told that there were five individuals occupying them. They knocked on the door of room 3, said to be occupied by "Doris"; there was no answer but he could hear a radio or television playing from within the room.

d. Stephen Thompson lived at the property for over three years and was one of those present on 7 July 2022. In his witness statement he said that the number of people living at the property varied from 3 to 5 people. He could not remember them by name but one whom he could remember was "Doris who lived in room 3".

e. Steven Lewis was living at the property on 7 July 2022 and he made two witness statements. He said that he moved into the property on 18 June 2022; he had sold his house and was waiting for another purchase and had nowhere else available to live. There were four other people in the property, one of whom was Doris. He said that she was in her 50s and 60s, and she wore flowing brightly coloured skirts. He would usually see her in the kitchen, they would chat, and she told him she is a nun. He moved out on 16 July 2022.

12. The FTT mentioned most of the above in its decision. At its paragraph 66 it declared itself satisfied beyond reasonable doubt that on 7 July 2022 the property was occupied by five persons who were paying rent, including Doris Anyanwu. It then turned to the question whether those five were occupying the property as their sole or main residence. It referred to *Camfield v Uyiekpen* [2022] UKUT 2324 (LC), which I will come back to shortly. It said that Ms Evans' and My Kenney's evidence was that "all the rooms they saw appeared to show that people had a settled intention to occupy the rooms as their main residence." It concluded that it was satisfied beyond reasonable doubt that the 5 people living at the property on 7 July 2024 were occupying it as their main residence.

13. It is not unusual for the FTT to have evidence from some but not all the occupants of a property in cases where this issue arises (as it does both in appeals from financial penalties and in applications for rent repayments); it may be that some have moved on or are

otherwise unavailable by the time the proceedings are commenced. Direct evidence is not essential and inferences can be drawn from other evidence. In *Opara v Olasemo* [2020] UKUT 96 (LC) 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. Two of them did not give evidence; but one of them had been living at the property for some years and the other was in receipt of housing benefit. As the Tribunal put it:

> " 31. … In the absence of co-operation 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 "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.
> 32. I take the view that there was strong evidence that Eddie and Mr Neville had their home at the property - in Eddie's case this seems to have been accepted by the respondent. 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."

14. But there must be some evidence from which an inference can be drawn. In *Camfield v Uyiekpen* the same issue arose in relation to an occupant of whom all that was known was that she had lived at the property for three months, had paid a rent of £950 a month, and had brought her belongings to the property. The FTT was not satisfied to the criminal standard of proof that she had her only or main home there, and the Tribunal upheld that finding:

> "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."

15. Even less information was available about Doris Anyanwu in the present appeal. Neither Ms Evans nor Mr Kenney had seen her, nor had they seen her room. Nothing is known about her beyond the trivial details mentioned by Mr Lewis. There was no evidence as to when she arrived or left. The person who said most about her, Mr Lewis, barely lived at the property for a month.

16. The Tribunal will only rarely interfere with a finding of fact made by the FTT, because the FTT is best placed to assess the evidence it saw and heard and then to make findings of fact. But in the present case the problem is the absence of evidence. I take the view that the finding that Doris Anyanwu occupied the property as her only or main residence on 7 July 2022 could not be justified on the evidence before the FTT, and it is therefore set aside.

Conclusion

17. The consequence of the setting aside the FTT's finding about Doris Anyanwu is that only four people have been found to be occupying the property as their only or main residence on 7 July 2022, and therefore the finding that the appellant was committing the offence created by section 72(1) of the Housing Act 2004 cannot stand and no financial penalty can be imposed upon him. The FTT's decision imposing the financial penalty is set aside.

Upper Tribunal Judge Elizabeth Cooke

12 December 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.