Upper Tribunal for Scotland

[2021] UT 11
UTS/AP/20/0020

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

IN AN APPEAL AGAINST
A DECISION OF THE FIRST TIER TRIBUNAL FOR SCOTLAND

in the case of

Ms Thalia Ostendorf, 13 Straiton Way, St Andrews, KY16 8HT
per Living Rent Edinburgh
58/2 Great Junction Street Edinburgh

Appellant

and

Rollos Solicitors & Estate Agents, 6 Bell Street St Andrews, KY16 9UX

Respondent

FTT Case Reference FTS/HPC/LA/19/1726

8 FEBRUARY 2021

The Upper Tribunal, Grants the appeal and:

1. Quashes the Determination of the First-tier Tribunal for Scotland dated 17 February 2020 in so far as it dealt with the appellant's complaint that the respondent failed to comply with the notice requirements in paragraph 82 of the Letting Agent Code of Practice (Scotland);

2. Remits the case to the First-tier Tribunal for Scotland with a Direction to apply paragraph 82 as construed by this Tribunal and that end:

a. To make findings in fact relating to the respondent's failures to comply with said paragraph 82 based on consideration of the evidence before the First-tier Tribunal which is referred to in the said Determination;

b. In the event that the respondent is found on the facts to be in breach of said paragraph 82 to proceed to consider the grant of a Letting Agent Enforcement Order in consequence of said breach.

Reasons for decision

Introduction

[1] In this document Ms Ostendorf is referred to as "the appellant" unless the context otherwise requires and Messrs Rollos referred to as "the respondent". The appellant was a tenant within a large HMO Property 14 South Street, Saint Andrews ("the HMO Property"). She had the exclusive use of a bedroom (Room 14) within the HMO Property. There were 13 other residents within the HMO Property who each had individual rooms.

[2] On 3 August 2020 the appellant was granted permission to appeal by the First-tier Tribunal ("FtT") against part of its determination dated 17 February 2020. The FtT determined three complaints made by the appellant about the service provided by the respondent as a letting agent for the HMO Property. The appellant was successful in one of her complaints. The present appeal relates to one of the grounds of complaint rejected by the FtT. That complaint was stated by the FtT as follows:

> "that proper notification had not been given to tenants within the Property when access was being taken and that unauthorised entry had taken place"

The FtT approached this complaint as giving rise to a question about failure to comply with paragraph 82 of the Letting Agent Code of Practice (Scotland) ("the Code") and rejected the complaint.

Grounds of appeal

[3] The Form UTS-1 states the ground of appeal as follows

> "Our appeal is on the [FtT]'s interpretation of paragraph 82 of the Letting Agent Code of Practice (Scotland). The decision (attached) states that requirements on notifying tenants prior to entry to the property should not be applied to communal areas of an HMO Property. This is an error in the application of the Letting Agent Code of Practice (Scotland) to the facts of the case and acts against the spirit of the law which should be understood to protect the privacy and security of tenants."

[4] The Code was made under section 48 of the Housing (Scotland) Act 2014 ("the HSA 2014"). Paragraph 2 of the Letting Agent Code of Practice (Scotland) Regulations 2016 (SSI 2016/133) made under the HSA 2014 gives statutory authority to the Code which is set out in the Schedule to the Regulations. Paragraph 82 of the Code states:

> "You must give reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours notice must be given unless the situation is urgent or you consider that such notice would defeat the object of the entry. You must ensure that the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant"

The proceedings before the FtT

[5] The FtT concluded that the exclusive part of the HMO Property let to the appellant was Room 14. Whilst the lease of Room 14 gave rights to the communal facilities within the larger building to the appellant, these were shared with the other 13 residents. The FtT was satisfied in relation to Room 14 itself that paragraph 82 applied in full. The FtT took a more pragmatic approach to the question whether paragraph 82 applied to the communal facilities in full. If it did the respondent would arguably require all 14 residents to be present

upon taking entry. As communal areas would require to be crossed to get to any individual room that would mean, on a literal interpretation, that if Room 6, for example, required a repair that all the 13 other tenants must be present. If a single tenant in the larger building wished to be difficult, they could refuse every request for access, even to other rooms. That would, on the face of it, mean that the respondent would need to get a warrant on each occasion to allow it to comply with paragraph 82 of the Code, even if the reason for access were to carry out a minor repair in another resident's room.

[6] When seeking permission to appeal the appellant submitted that the Code made no allowance for the view taken by the FtT. All residents should be notified if the common parts are being accessed. The appellant's submission was that if no objection was received from a resident then such silence could be deemed to be consent. The appellant viewed the relevant paragraph 82 of the Code as being clear and unambiguous – notification was required to all residents within the larger property on each occasion.

[7] When granting permission to appeal the FtT noted that within the Code there was no definition of what comprised an individual property or gave any indication as to how notice would be dealt with where there were multiple, unrelated residents within a property such as an HMO. The FtT did note, however, that the Code stemmed from the HSA 2014. Part 4 of that Act contains the provisions regarding letting agents. Section 62 is the definitions section and defines a "house" by reference to the Antisocial Behaviour etc. (Scotland) Act 2004 ("the 2004 Act"). The 2004 Act contains two near identical definitions at Part 7 (Anti-social Behaviour notices) and Part 8 (Landlord Registration). Section 81 is the interpretation section of Part 7 and provides as follows:

> "relevant house" means, subject to subsection (2), any building or part of a building which— (a) is occupied as a dwelling under—(i) a tenancy; or (ii) an occupancy arrangement; and (b) does not fall within subsection (3).

> (2) If —
> (a) the same person is the landlord in relation to two or more relevant houses; and
> (b) those relevant houses share the same toilet, washing or cooking facilities, then those relevant houses shall be deemed to be a single relevant house."

Section 101 is the interpretation section for Part 8 of the 2004 Act. It was subject to significant amendment by the HSA 2014 and provides the following definition:

> "(1) … *"house"* means, subject to subsection (2), a building or part of a building occupied or intended to be occupied as a dwelling; …
> (2) If two or more dwellings within a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part."

[8] The FtT noted, in particular, the terms of subsection 2 of section 81, which effectively treats all rooms that share common facilities as a single house for the purposes of the 2004 Act. Whilst Parts 7 & 8 of the 2004 Act did not relate to letting agents directly, nonetheless, there was a link back to that definition from the Code, to the HSA 2014 and on to the 2004 Act. On reflection, the FtT considered that there was an argument that notification should have taken place on any occasion the respondent had taken access to any part of the larger building. Whilst this may mean that landlords of large bedsit style HMO's might face particular difficulties in accessing properties, this may simply be an unintended consequence of the Code. The FtT concluded that it was arguable on a strict interpretation of the Code and the 2004 Act that it had erred in applying the law to the facts of this case and so granted permission to appeal.

Submissions of the parties

[9] Both parties supplied little by way of submission to this Tribunal. The failure of both parties to provide any serious analysis in support of their respective positions in this appeal is disappointing. Many appeals to this Tribunal involve parties who are not represented. It

is important that professional representatives make substantive submissions to the Tribunal in appeals of this kind. In the present case the FtT expressly said that it had reflected further and had decided it should grant permission to appeal. In light of that statement the respondent has not engaged meaningfully with the issue before this Tribunal and has simply stated that it supported the original decision. This lack of engagement seems odd given the potentially very serious consequences for the respondent's registration as a letting agent of the making of a Letting Agent Enforcement Order ("LAEO"). In a similar way, even though the appellant's advisers obviously had specialist knowledge of the statutory context, they did not choose to provide a detailed submission setting out the argument with supporting authorities.

Reasons for decision

[10] The FtT's reasons for its written decision are inadequate. The FtT made only two findings relevant to this complaint. The first was that the appellant was the tenant of a room in the HMO Property and the second that the respondent was the letting agent at the material time. It also purported to find as a fact that there was no breach of paragraph 82 of the Code. That is not properly a finding in fact but really a conclusion of law, as it is based on the FtT's interpretation of the meaning of paragraph 82. The FtT said the following:

> "…the [appellant] highlighted the terms of emails between herself and the [respondent] dated inter alia 28 January, 29 January, 5 April and 20 May, all 2019. On the face of it, these emails did indicate that the [respondent] had taken access to the Property without, on all occasions, notifying all of the tenants within the Property. The emails confirmed, for example, that access had been taken to the property to allow the delivery of a Notice to Leave on the [appellant]"

It may be that the last word in the quotation is intended to refer to the appellant but as the email have not been produced I am unable to say.

[11] The Determination does not contain any relevant findings in fact relating to the extent of the common areas used by the appellant, even though the discussion of the evidence makes clear that the communal parts apparently included a kitchen and shower facilities. The FtT also seems to have accepted evidence that on occasion entry was taken to communal areas used by the appellant without notice being given to her, but again there are no specific findings. This is even though it is clear from its discussion that the FtT considered evidence in the form of emails which related to the appellant's complaints. It is not possible for this Tribunal to ascertain the dates of the alleged breaches from the documentation provided for the purposes of this appeal. This is a matter of some regret given it seems there was no real dispute between the parties as to the facts of the matter. As the FtT's decision to reject this particular complaint depended on its interpretation of paragraph 82 of the Code, it ought at least to have stated what facts it would have found established if it erred in its interpretation and on the evidence before it.

[12] Paragraph 82 falls within section 5 of the Code which is entitled "Management and maintenance". The code is detailed and specific in respect of many aspects of the services provided by a letting agent. It does not contain any interpretation provisions. It is a statutory code and it is reasonable to proceed on the basis that the expressions used in it are intended to have the same or similar meaning to the same expressions used in other related statutory contexts. Section 62 of the HSA 2014 expressly defines "house" by reference to the 2004 Act. The definition in Part 8 of the 2004 Act is most relevant to this appeal because it contains the definition of "house" that is to be used in HSA 2014 as set out above.

[13] Section 61 HSA 2014 provides

> "(1) For the purposes of this Part, *"letting agency work"* means things done by a person in the course of that person's business in response to relevant instructions which are—
> (a) carried out with a view to a landlord who is a relevant person entering into, or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlord's house as a dwelling, or
> (b) for the purpose of managing a house (including in particular collecting rent, inspecting the house and making arrangements for the repair, maintenance, improvement or insurance of the house) which is, or is to be, subject to a lease or arrangement mentioned in paragraph (a)."

Section 62 also provides

> ""*tenant*" , in relation to an occupancy arrangement, means the person who under the arrangement is permitted to occupy the house."

[14] It is also of interest and significance to consider the terms of Part 9 of the Housing (Scotland) Act 2006 ("the 2006 Act"). That Part of the Act deals with rights of entry under the 2006 Act. The second sentence of paragraph 82 of the Code expressly makes reference to section 184 which is within that part of the 2006 Act. Section 184(4A) has been added by section 25(8) of the HSA 2014 and declares that the reference to an occupier in section 181 (which confers a right of entry of a number of parties) includes a tenant.

[15] The FtT dealt with this question of interpretation as a matter of practicality as regards parts of the HMO Property used in common by individual tenants. It equated the HMO Property to a tenement of flats. There is no principled basis by which it is possible to say at what point there are too many tenants in a HMO Property to require the letting agent to give notice to all of them. If 14 is too many, what is the minimum number? The way in which title conditions commonly regulate ownership in a tenement of flatted dwellinghouses is not analogous to the situation of those living in a HMO Property. I do not consider this to be a tenable basis for construing the notification provision of paragraph 82.

[16] A wider consideration of some of the authorities on the meaning of words such as "dwelling" and "house" in housing statutes supports a more expansive interpretation of who is the subject of the requirement.

[17] In *Uratemp Ventures Limited* v *Collins* [2002] 1 A.C. 301 Lord Bingham of Cornhill said the following at paragraph 10 in relation to the phrase "let as a separate dwelling" in the Housing Act 1988 section 1(1) in the context of shared accommodation:

> "Save that a dwelling-house may be a house or part of a house (1988 Act, section 45(1)), no statutory guidance is given on the meaning of this now rather old-fashioned expression. But the concept is clear enough: it describes a place where someone dwells, lives or resides. In deciding in any given case whether the subject matter of a letting falls within that description it is proper to have regard to the object of the legislation, directed as it is to giving a measure of security to those who make their homes in rented accommodation at the lower end of the housing market. It is not to be expected that such accommodation will necessarily offer all the amenities to be found in more expensive accommodation."

At paragraph 12 he went on to say:

> "It appears, in the present case, that Mr Collins habitually used some electrical devices to warm food in his room before eating it. The room was equipped with a power point which permitted that. I doubt if what he did could properly be described as cooking, but I do not think it matters. It is in my view plain on the evidence that this room was Mr Collins's home, the place where he lived, and this is so whether he had his meals out or warmed up food to eat in his room or did a little rudimentary cooking or a bit of all three. If a room were so small and cramped as to be unable to accommodate a bed, I should be inclined to doubt whether it would qualify to be called a dwelling-house because, although sleeping in premises may not be enough to make them a dwelling-house, premises will not ordinarily be a dwelling-house unless the tenant sleeps there. But in my view the courts should be very wary of laying down inflexible rules which come to be mistaken for rules of law even though they are very largely conclusions of fact based on particular cases."

In the same case Lord Millet said the following at paragraph 31:

> "In both ordinary and literary usage, residential accommodation is "a dwelling" if it is the occupier's home (or one of his homes). It is the place where he lives and to which he returns and which forms the centre of his existence. Just what use he makes of it when living there, however, depends on his mode of life. No doubt he will sleep there and usually eat there; he will often prepare at least some of his meals there. But his home is not the less his home because he does not cook there but prefers to eat out or bring in ready-cooked meals.".

More recently in *R(N)* v *Lewisham LBC* [2015] A.C. 1259 Lord Hodge JSC said the following at paragraph 45:

> "Pulling together the threads of the case law, in my view the following can be stated: (i) the words "live at", "reside" and "dwell" are ordinary words of the English language and do not have technical meanings, (ii) those words must be interpreted in the statutes in which they appear having regard to the purpose of those enactments,"

The purpose of paragraph 82 of the Code is to regulate the means by which a letting agent may seek to disturb the privacy of tenants in their own private dwellings. I consider that the obligation on the respondent to give notice applies to all those who are tenants of the parts of the HMO Property in relation to both areas which each tenant occupies exclusively and the areas which he or she shares with other tenants.

[18] Paragraph 82 actually uses the word "property" and not "dwelling" or "house". So far as I can ascertain there is no separate definition of "property" in the HSA 2014 or in the regulations promulgating the Code. It is not clear why the word "property" is used in the Code given the definition of "house" in HSA 2014 under reference to the 2004 Act and the way in which "letting agency work" is defined in HSA 2014. I do not consider that the word "property" has any technical meaning in this context and I have sought to interpret it having regard to the purpose of the Code. I conclude that the notification provisions apply equally to areas that a tenant occupies exclusively and areas to which he or she uses in common with other tenants.

[19] It may be that the issue which caused the FtT particular concern arose from the final sentence of paragraph 82 of the Code which requires that "[The letting agent] *must ensure* that the tenant is present when entering the property…" (emphasis added). It might be thought that this is a state of affairs which may not be easily capable of achievement by a letting agent because it is not wholly within his or her control but that is not what this

appeal is about. The point under consideration is the obligation to give reasonable notice provided for separately in the first sentence of paragraph 82 of the Code. The exact extent of the obligation imposed on a letting agent by the words in the first part of the last sentence of paragraph 82 may require to be considered in later cases.

[20] The FtT's concern for the practical effect of the obligation imposed by the last sentence may have led it to provide a limitation on notification that is not justified. Notification is a prior and separate obligation of great importance. Tenants who are given notice by a letting agent that entry is being taken are in a position to decide how they wish to deal with the proposed entry. The failure to notify leads to entry being taken without any prior knowledge on the part of individual tenants.

[21] As regards the question of practicality of notification, the appellant's application for permission to appeal pointed out that many letting agents announce their intention to enter the property with an email to all tenants, with a note stating that a lack of response will be taken as an indication of no objection from the tenants. They submitted that the burden of communicating with 13 tenants in this fashion is minimal. This statement does not seem particularly controversial.

Conclusion

[22] I have concluded that the FtT erred in law in its interpretation of paragraph 82 of the Code, the appeal succeeds but as all the factual material necessary is not available to this Tribunal the decision will not be remade. The FtT's decision discloses that there probably was a proper basis for concluding as a matter of fact that the respondent did not comply with notification requirements of paragraph 82 as regards the appellant, but it has not made the requisite findings in fact. The decision of the FtT on this particular point will be quashed

and the matter remitted to the FtT with directions to consider the evidence, and make findings in fact, as to whether the respondent did breach of its obligation to notify the appellant.

[23] Read short, section 46(1) HSA 2014 provides that where a tenant or former tenant has made an application to the FtT for a determination that a letting agent has failed to comply with the Letting Agent Code of Practice. Section 46(6) HSA 2014 provides that the FtT must decide on an application under subsection (1) whether the letting agent has complied with the code of practice. Section 46(7) HSA 2014 provides that:

> "Where the Tribunal decides that the letting agent has failed to comply, it must by order (a "[LAEO") require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure."

Section 46(8) HSA 2014 provides details of the essential features of a LAEO. The FtT did not consider these aspects of the application because it erred in law as to the meaning of paragraph 82 of the Code. The case is remitted for the FtT to make the necessary findings in fact and to consider the terms of the proposed LAEO that must be prepared as a result. As noted above in this case the FtT found breaches of the Code on other aspects of the application before it and proposed an LAEO on those other points. If it can be arranged, there is no reason why this case requires to go to a differently constituted FtT. Had the FtT found a breach of paragraph 82 it would have had to assess the proposed sanction in the context of its whole conclusion on the other aspects of the application before it.

Notice to the parties

[24] A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this

decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.