UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 235 (LC)

UTLC No: LC-2021-439

Royal Courts of Justice,
Strand, London WC2A

25 September 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – RENT REPAYMENT ORDER – "rent-to-rent" arrangement – order made by FTT against head landlords – tenants' application to admit new evidence on appeal to prove intermediate landlord company had been dissolved – whether dissolution created direct relationship between tenants and head landlords – s.40, Housing and Planning Act 2016 – s.18, Housing Act 1988 – s.1012, Companies Act 2006 – application to admit new evidence refused

BETWEEN:

EDOUARD CUSSINEL (1)
TAVY CUSSINEL (2)

Appellants

and

ALAN GUERIN and others

Respondents

Re: 269 Coopersale Road,
London E9

Martin Rodger KC, Deputy Chamber President

Decision on written representations

The following cases are referred to in this decision:

Ladd v Marshall [1954] 1 WLR 1489

Orchard v Mooney [2023] UKUT 78 (LC)

Point West GR Ltd v Bassi [2020] EWCA Civ 795

Rakusen v Jepsen & Ors [2023] UKSC 9

Terluk v Berezovsky [2011] EWCA Civ 1534

1. This appeal is about rent repayment orders under Chapter 4 of Part 2 of the Housing and Planning Act 2016.

2. In *Rakusen v Jepsen & Ors* [2023] UKSC 9 the Supreme Court determined that a rent repayment order can only be made against the immediate landlord of the tenant who applied for the order and cannot be made against a superior landlord. The First-tier Tribunal, Property Chamber (the FTT) had made a repayment order against a superior landlord, which had been upheld by this Tribunal, but that decision was reversed by the Court of Appeal whose conclusion was upheld by the Supreme Court.

3. In this case the FTT made rent repayment orders in circumstances very similar to those in *Rakusen.* The appellants, Mr and Mrs Cussinel, were found to have let their house to an intermediate tenant, De Beauvoir & Company Ltd, which then let it at various times to the nine respondents (to whom I will refer as "the tenants"). They occupied the property in circumstances which caused it to become a house in multiple occupation. The house was not licensed, as it was required to be by section 72, Housing Act 2004.

4. The FTT was satisfied that an offence had been committed by the appellants because they received a rack rent from De Beauvoir & Company Ltd and therefore satisfied the definition in section 263, Housing Act 2004 of persons having control of the house. On the basis of this Tribunal's decision in *Rakusen* (which had not yet reached the Court of Appeal) the FTT had jurisdiction to make rent repayment orders. It made orders in favour of all nine respondents in varying amounts which, in total, came to more than £68,000.

5. The FTT made its decision in June 2021, but the appellants' appeal to this Tribunal was stayed until the completion of the appeals in *Rakusen*. The law is now clear and the appeal may proceed.

6. On the face of it, following the Supreme Court's decision, the FTT had no power to make rent repayment orders against the appellants because they were not the respondents' landlords for the purpose of section 40(2), 2016 Act. On that basis the appeal would have to be allowed and the rent repayment orders set aside.

7. But the respondents, who are represented by Flat Justice CIC, do not accept that the matter is as clear cut as that. They would now like to argue that a direct relationship of landlord and tenant did exist between each of them and Mr and Mrs Cussinel and that the FTT therefore had power to make the rent repayment orders. To help them make out that case they have asked the Tribunal to permit them to rely on additional evidence which was not available to the FTT when it made its decision. Before determining that application it is necessary to say a little more about the facts and the proceedings before the FTT.

8. 69 Coopersdale Road is a five bedroomed house in east London which was formerly Mr and Mrs Cussinel's family home. In 2016 they engaged an estate agent to let it for them while they moved to Singapore. They were contacted by Mr James Manero and arranged to let the house to his company, De Beauvoir and Company Ltd (the Company), for a term of five years at a rent of £3,050 a month.

9. The tenancy agreement between Mr and Mrs Cussinel and the Company was made in writing on 28 July 2016. It was described as an assured shorthold tenancy although, as the FTT later pointed out, that description was not apt since an assured tenancy can only be granted to an individual (section 1(1), Housing Act 1988). Under the terms of the tenancy the landlords were responsible for repairs to the structure and exterior of the building and for servicing gas appliances and installations. The Company was expressly permitted to assign, sublet or share all or part of the premises. Mrs Cussinel told the FTT that she had been aware that the property would be sublet by the Company but nothing in the agreement authorised the Company, or Mr Manero personally, to do so as agents on behalf of her or her husband.

10. The Company began letting individual rooms in the house to unconnected tenants from 1 August 2016. The FTT was satisfied that the house was an HMO and that it had been occupied by at least five tenants living in at least two or more households at all times from 1 October 2018 such that it was subject to mandatory licensing. No licence was applied for by the Company or by Mr and Mrs Cussinel (who were in Singapore).

11. In its decision of 14 June 2021 the FTT said that it was satisfied to the required criminal standard of proof that the elements of the offence of being in control of an unlicensed HMO contrary to section 72(1), 2004 Act, had been made out against Mr and Mrs Cussinel. It did not accept their defence that ignorance of how their house was being used or that a licence was required provided them with a reasonable excuse.

12. In order to determine the issue of reasonable excuse the FTT considered evidence of how the property had been let. In particular, it found that "Mrs Cussinel was listed as the landlord and Concrete Maintenance Ltd (t/a Hertford Group) was listed as the managing agent" in the tenancies of five of the nine tenants. The earliest of these tenancies had been granted to Mr Moore in December 2017.

13. The FTT's description of the tenancy agreements in which Mrs Cussinel was named as landlord was not entirely accurate. The company to which it referred, Concrete Maintenance Ltd, was not described as "managing agent" but rather as "Managing Tenant". Although the document described itself as an assured shorthold tenancy it did not state who was letting the room in question to whom but said only, opaquely, that "this agreement is for the letting of a dwelling". Rights and obligations which would usually be those of the landlord (e.g. repairing obligations and the right to possession at the end of the tenancy) were assumed instead by "the Managing Tenant/landlord". The documents seen by the FTT were not signed but the execution page provided for a signature "on behalf of Managing Tenant/landlord" by "Hartford Group".

14. The tenants told the FTT that they had been under the impression that Mr and Mrs Cussinel were their landlords and that Mr Manero was merely their agent operating through various companies. The FTT did not accept that that was correct, and made the following finding:

> "The Tribunal accepts that the Respondents [Mr and Mrs Cussinel] were the head landlords and that Mr Manero had no authority to put Mrs Cussinel's name into any of the applicants' tenancy agreement."

15. Despite this conclusion the FTT did not accept that Mr and Mrs Cussinel "were as ignorant as they claim" about the manner in which the property was being occupied. They knew Mr Manero's business was letting properties, and their agreement with him permitted him to let their former home, as they knew he would and as they observed when they visited the property. They also "retained a degree of control over the maintenance of the property" and various problems over appliances and repairs were referred to them by Mr Manero. The FTT concluded that the couple were aware that the house was an HMO and, to the extent that their defence of reasonable excuse was based on their suggested ignorance of the arrangements, that ignorance was only in relation to matters of detail. It was on that basis that the defence of reasonable excuse was dismissed and the FTT proceeded to make the rent repayment order.

16. Mr and Mrs Cussinel were granted permission by the Tribunal to argue their appeal on the single ground that the FTT had been wrong to find that, as superior landlords, they were nevertheless landlords for the purpose of section 40(2), 2016 Act, against whom a rent repayment order could be made.

17. In response to the appeal the tenants acknowledge that they "chose not to pursue an argument before the First-tier Tribunal that Mr and Mrs Cussinel were their immediate landlords". The reason they give for making that choice is said to have been "to save time for the tribunal and parties, on the basis that it was irrelevant" to their case. Whether Mr and Mrs Cussinel were the tenants' immediate landlords rather than superior landlords with whom they had no direct relationship of landlord and tenant was understood to be irrelevant because the proceedings were conducted in the FTT before the Court of Appeal had reversed this Tribunal's decision in *Rakusen*.

18. The tenants now wish to argue as primary position that Mr and Mrs Cussinel were their immediate landlords and that Mr Manero and his various companies were acting as their agents to collect the rent on their behalf.

19. That proposition is a direct challenge to the FTT's finding of fact that the couple were the head landlords and that Mr Manero had no authority to act on their behalf. It would be necessary for the tenants to obtain permission to cross-appeal but, given the understanding of the law current when the issues were framed before the FTT, the Tribunal might be inclined to grant permission even at this late stage if there was any realistic prospect of the proposed challenge being successful.

20. The case which the tenants now wish to advance is explained in their statement of case for the appeal and depends on the following four points:

    1. First, the agreement between Mr and Mrs Cussinel and the Company was found by the FTT not to be "a real lease" as a company cannot be an assured shorthold tenant. The tenancy agreement of 28 July 2016 therefore "had no meaning", and since the Company was not a tenant "it cannot have been a landlord and so must have been acting as agent".
    2. Secondly, the FTT's findings about the couple's dealings with the tenants supported the argument that they were the immediate landlords.

3. Thirdly, it is now known that the Company ceased to exist on 31 January 2017 when it was dissolved and struck off the register of companies after failing to lodge statutory accounts. The Company cannot have been the tenants' landlord after that date.
4. On the dissolution of the Company the effect of section 18(1), Housing Act 1988 was that the tenants became the direct tenants of the persons who were otherwise entitled to actual possession of the property, namely, Mr and Mrs Cussinel.

21. The first of these points is misconceived. The FTT did not find that there was no tenancy agreement between the Company and the Cussinels. There was an agreement and it did create a tenancy, but it was not an assured shorthold tenancy, as it purported to be, because the Company was not an individual and so could not be an assured tenant.

22. The second point is similarly of no substance. The Cussinels had obligations under their tenancy with the Company, including to repair the structure of the building and the gas and other service installations within it. They also had a free-standing right of entry to view the condition of the premises. The property was also their former home and might be again in future. Nothing in their occasional involvement in the maintenance of the building is inconsistent with them being the superior landlords in a chain, nor suggestive of any direct relationship between them and the tenants in occupation.

23. It is in respect of the third point that the tenants ask for permission to introduce new evidence which was not provided to the FTT (because the tenants were unaware of it). That evidence comprises a number of documents, namely, Mr Manero's application to register the Company, its certificate of incorporation, a notice from Companies House addressed to the dierctors warning them of the Registrar's intention to strike the Company off the register, and notice of the dissolution of the Company on 31 January 2017. There has been no application to rely on any additional witness statement and I therefore assume that the tenants' new case depends simply on the legal consequences of the Company having been dissolved, and not on any dealings between them and Mr and Mrs Cussinel or any knowledge on either side of what had become of the Company.

24. In the Tribunal's recent decision in *Orchard v Mooney* [2023] UKUT 78 (LC) I discussed the admission of new evidence on an appeal against a decision of the FTT. Since the decision of the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489, three conditions have usually been applied by courts when such a question arises. Those conditions are, first, that the evidence could not have been obtained for use at the original hearing with reasonable diligence; secondly, that if the evidence had been given, it would probably have had an important influence on the result of the case; and, thirdly, that the evidence is apparently credible. The modern approach, since the making of the Civil Procedure Rules, is to treat the same three factors as the main considerations governing the exercise of the discretion to admit new evidence now conferred by CPR 52.11(2)(b): see *Terluk v Berezovsky* [2011] EWCA Civ 1534 at [32].

25. The Civil Procedure Rules do not apply in tribunals, but the Court of Appeal has indicated that the same *Ladd v Marshall* considerations should continue to apply to the admission of new evidence in appeals to the Upper Tribunal: see *Point West GR Ltd v Bassi* [2020] EWCA Civ 795, at [51].

26. The tenants acknowledge that the evidence of the Company's dissolution was available and could have been provided to the FTT. But, on the law as it was then understood, it was irrelevant to the remedy they sought, and they argue that it would not be reasonable to expect them to have produced it. They emphasise that the first of the *Ladd v Marshall* conditions has sometimes been applied leniently, where the overriding objective of doing justice in the individual case requires (see, for example, *Jasinarachchi v General Medical Council* [2014] EWHC 3570 (Admin)). In my judgment neither the tenants themselves, nor their representatives, are to be criticised for not researching the status of the Company or discovering that it had been struck off, and I would not prevent them from relying on the new evidence for that reason alone.

27. The evidence itself comprises material downloaded from the Companies House website and it is obviously credible. The third of the *Ladd v Marshall* considerations is therefore met.

28. The determinative question is whether, if the evidence had been given, it would probably have had an important influence on the result of the case. That depends on whether, as the tenants suggest, the effect of section 18, Housing Act 1988 in these circumstances is to create a direct relationship of landlord and tenant between the tenants in occupation and Mr and Mrs Cussinel.

29. Section 18 of the 1988 Act is headed "provisions as to reversions on assured tenancies". Section 18(1) says this:

> "If at any time –
>
> (a) a dwelling-house is for the time being lawfully let on an assured tenancy, and
>
> (b) the landlord under the assured tenancy is himself a tenant under a superior tenancy; and
>
> (c) the superior tenancy comes to an end,
>
> then, subject to subsection (2) below, the assured tenancy shall continue in existence as a tenancy held of the person whose interest would, apart from the continuance of the assured tenancy, entitle him to actual possession of the dwelling-house at that time."

30. At common law, a sub-tenant's interest is normally extinguished automatically on the determination of the tenancy out of which it was created. The effect of section 18(1) is to prevent that from happening to an assured tenancy. Thus, if the landlord under an assured tenancy is themselves a tenant whose tenancy comes to an end, the position of the assured subtenant is protected and their tenancy continues as a direct relationship with their former landlord's landlord. (The qualification in subsection (2) prevents this from happening where the superior landlord is incapable of being the landlord under an assured tenancy, but it is not applicable in this case and it can be ignored).

31. But section 18(1) only has effect where the tenancy of the intermediate landlord comes to an end. Where the landlord under a tenancy is a company, and the company is dissolved, does the tenancy come to an end? The tenants have not addressed that question in their

submissions, but the answer is clear. The effect of dissolution on a company's property is provided for by section 1012, Companies Act 2006, as follows:

> "1012 Property of dissolved company to be bona vacantia
>
> (1) When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and—
>
> (a) accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being (as the case may be), and
>
> (b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall."

32. The Company's tenancy, held by it from Mr and Mrs Cussinel, did not cease to exist when the Company was dissolved on 31 January 2017. Instead it became classified as "*bona vacantia*", the legal term for property without an owner which is applied to the property of people who die without making a will and the property of dissolved companies. Such property does not cease to exist, but vests in the Crown.

33. Because the superior tenancy did not come to an end nothing in section 18, 1988 Act had the effect of creating a direct relationship of landlord and tenant between the tenants in this case and Mr and Mrs Cussinel. The fourth and most important step in the tenants' argument cannot be substantiated. It follows that evidence about the fate of the Company would not have made any difference to the outcome of the proceedings before the FTT. In particular, it could not have justified a finding that Mr and Mrs Cussinel were the landlords of the tenants for the purpose of section 40, 2016 Act.

34. For these reasons I refuse to admit the additional evidence on which the tenants wish to rely because it could make no difference to the outcome of the appeal.

35. When I gave directions for submissions to be made in writing on the application to admit new evidence I directed that the tenants should also state whether, if the application was refused, they would still ask the Tribunal to dismiss the appeal of Mr and Mrs Cussinel against the FTT's decision. If they would, they were directed to explain the basis on which they would argue that the FTT's decision should be upheld in view of the Supreme Court's decision in *Rakusen*.

36. The only basis on which the tenants have indicated that they wish to continue to resist the appeal is on the grounds that Mr Manero was the agent of Mr and Mrs Cussinel. But the FTT considered that proposition and rejected it on the evidence; no different evidence is available and nothing has been said by the tenants in their submissions to undermine the FTT's finding of fact. I am therefore minded to treat the tenants' application to admit new evidence as an application for permission to appeal out of time against the FTT's finding of fact that no agency relationship existed, then to dismiss that application and finally to allow the appeal of Mr and Mrs Cussinel without listing the matter for hearing. If the tenants wish to suggest any reason why I should not adopt that course they may do so

within 14 days of the date this decision is sent to their representatives. If nothing further is received within that period the appeal will be allowed, the FTT's decision of 14 June 2021 will be set aside and the tenants' application for rent repayment orders will stand dismissed without further order.

Martin Rodger KC,

Deputy Chamber President

25 September 2023

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.