UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING - FINANCIAL PENALTIES – breach of HMO Management Regulations - defence of reasonable excuse – whether local housing authority required to prove beyond reasonable doubt that appellant had no such excuse – whether burden on appellant to establish reasonable excuse – ss.234A, 249A, Housing Act 2004 - Management of Houses in Multiple Occupation (England) Regulations 2006 – appeal dismissed

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

BETWEEN:

I R MANAGEMENT SERVICES LIMITED

Appellant

and

SALFORD CITY COUNCIL

Respondent

Re: 8 Irwell Avenue
Eccles
Manchester M30 OFA

Martin Rodger QC, Deputy Chamber President

12 March 2020

Manchester Civil Justice Centre

Alexander Adamou, instructed under direct public access, for the appellant
Paul Whatley instructed by Manchester City Solicitor, for the respondent

The following cases are referred to in this decision:

R v Charles [2009] EWCA Crim 1570

R v Edwards [1925] 1 Q.B. 27

R v Evans [2004] EWCA Crim 3102

R v Hunt [1987] A.C. 352

*Woolmington v. Director of Public Prosecution*s [1935] A.C. 462

Introduction

1. On whom does the burden of proof lie when it is said that the manager of a house in multiple occupation had a reasonable excuse for conduct which, but for that defence, would amount to a relevant housing offence under section 249A, Housing Act 2004?

2. That is the issue in this appeal from a decision of the First-tier Tribunal (Property Chamber) (FTT) issued on 12 August 2019. The FTT decided that the appellant, IR Management Ltd, had no reasonable excuse for breaches of regulation 4(4) of the Management of Houses in Multiple Occupation (England) Regulations 2006 which had been identified by the local housing authority, Salford City Council, on an inspection by its officers on 27 March 2018 of 8 Irwell Avenue, Eccles, Manchester, a house under the management of the appellant.

3. At the hearing of the appeal the appellant was represented by Mr Alexander Adamou and the respondent by Mr Paul Whatley. I am grateful to them both for their helpful submissions.

How the issue arises

4. The 2006 Regulations are made under powers conferred by section 234, Housing Act 2004. They impose obligations on the person managing an HMO to make satisfactory arrangements including in respect of the repair, maintenance, cleanliness and good order of the house. Sub-section (3) and (4) of section 234 are critical to this appeal; they provide:

> "(3) A person commits an offence if he fails to comply with a regulation under this section.
>
> (4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation."

5. Although it is an offence to fail to comply with the 2006 Regulations, rather than prosecute, the City Council decided to impose a civil financial penalty of £25,000 on the appellant. A separate penalty of £27,500 was imposed on Mr Leszek Bochenek, who was engaged by the appellant as a rent collector and to source tenants for its property portfolio. After considering appeals by both the company and its agent, the FTT reduced the sum payable by Mr Bochenek to £15,000 but increased the penalty on the appellant to £27,500 (the sum first proposed by the City Council in its notice of intention).

6. The appellant, through its director Mr Roberts, had explained to the FTT that it had had no knowledge that the property in question was an HMO. The house, which has two bedrooms, had been let in 2017 to a private individual on terms which prohibited sub-letting or sharing. Mr Roberts said he had visited the house on only one occasion during the letting and had not noticed any signs that it was in multiple occupation. The fact that it was an HMO, occupied by five people forming three separate households at the time of the City Council's inspection, was not disputed, but it was said that the appellant's lack of

knowledge that it was occupied in that way provided a reasonable excuse for it not having complied with the 2006 Regulations by, for example, installing suitable fire doors or a fire alarm system.

7. The FTT directed itself that, on the question whether the appellant had a reasonable excuse for not complying with the 2006 Regulations:

> "It is for the Appellant to establish that the statutory defence is made out. Whilst the Tribunal must be satisfied, beyond reasonable doubt, that each element of the relevant offence has been established on the facts, the Appellant who pleaded the statutory defence must then prove, on the balance probabilities, that the defence applies.'

8. The FTT did not accept the evidence of Mr Roberts that he had been unaware the property was in multiple occupation and rejected the appellant's defence. Permission to appeal that decision was granted by this Tribunal.

The appeal

9. On behalf of the appellant, Mr Alexander Adamou advanced two grounds of appeal:

    a. That the FTT was wrong to find that the appellant knew that the property was an HMO in the absence of evidence that the property was in fact an HMO on the date when the appellant had visited it (which was in March 2018).

    b. That the FTT misdirected themselves, in the passage from their decision cited above, and applied the wrong burden of proof and standard of proof to the defence under section 234(4), Housing Act 2004.

10. The first ground of appeal does not survive consideration of the written evidence presented to the FTT. This included the statement of one of the Council's housing officers that she had spoken to the occupiers of the house on 27 March 2018 and had been told that they had lived there for five months. There was also the witness statement of a neighbour that for a number of years the property had been overcrowded and a source of nuisance, with broken appliances and rubbish allowed to accumulate in the front and rear gardens. This was material on which the FTT could properly have found that the property was an HMO at the time Mr Roberts visited it (which was in March 2018, only shortly before the City Council's staff gained entry). The only reason the FTT did not make a specific finding to that effect is that the status of the property as an HMO at the material time was not disputed (as the FTT recorded at paragraph 51 of its decision). The evidence was consistent with the property having been an HMO for several years, and the possibility that it had only become one a few days before the City Council's inspection and after Mr Robert's attendance is fanciful. I therefore reject the first ground of appeal.

11. The substance of the appeal is in the second ground.

12. Mr Adamou submitted that the FTT had been incorrect to state that the burden of proving the defence of reasonable excuse was on the appellant and that it was required to do so to the civil standard. The correct approach, he suggested, was that the appellant had only had an evidential burden in relation to the defence i.e. it had to produce evidence which properly raised the question of its lack of knowledge that the property was in multiple occupation. Once the appellant had done that, which it did by Mr Roberts' evidence that he was unaware of how the property was occupied, it was then incumbent on the City Council to satisfy the FTT to the criminal standard of the absence of such reasonable excuse.

13. The starting point in considering where the burden of proof should lie on any issue was the well-known statement of Viscount Sankey L.C in *Woolmington v. Director of Public Prosecution*s [1935] AC 462, at 481-482, that:

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. [….] No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

14. Mr Adamou pointed out, correctly, that there is no provision in section 234 itself which expressly places a burden on the person alleged to have committed the offence of failing to comply with the 2006 Regulations. He submitted that in the absence of an explicit allocation of a burden on the accused, it was a question of interpretation of the statute whether the usual principle that the burden of proving each element of the offence fell on the prosecutor should be reversed. He referred to the statement of Lord Griffiths (with whom the other members of the House of Lords agreed) in *R. v Hunt* [1987] A.C. 352, 380:

> "Where Parliament has made no express provision as to the burden of proof, the court must construe the enactment under which the charge is laid. But the court is not confined to the language of the statute. It must look at the substance and the effect of the enactment."

15. At 374B of his Opinion, Lord Griffiths highlighted the difficulty created by the drafting of some statutes when considering whether, on a true construction, Parliament had intended the burden of proof on a particular issue to fall on the defendant:

> "The real difficulty in these cases lies in determining upon whom Parliament intended to place the burden of proof when the statute has not expressly so provided. It presents particularly difficult problems of construction when what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso from which it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it."

16. In his review of earlier authorities Lord Griffiths considered *R v Edwards* [1925] 1 Q.B. 27 where the Court of Appeal had identified an exception to the fundamental rule that the prosecution must prove every element of the offence charged, which it described in these terms:

> "This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception."

17. This common law principle was given statutory recognition by section 101, Magistrates' Court Act 1980, so that the same rule applies to offences triable on indictment or summarily.

18. At 375G of his opinion in *Hunt* Lord Griffiths said this of the Court of Appeal's formulation in *Edwards* of the exception to the general rule:

> "I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare ……. I would prefer to adopt the formula as an excellent guide to construction rather than as an exception to a rule. In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of the Act of 1980 which the Court of Appeal rightly decided reflects the rule for trials on indictment. With this one qualification I regard *R v Edwards* as rightly decided."

19. The proper interpretation of Section 234 was, Mr Adamou submitted, to read sub-sections (3) and (4) together. Thus, the stipulations that it will be an offence for an individual to fail to comply with the 2006 Regulations, a defence if they have a reasonable excuse for doing so, should be read as making it an offence for an individual not to comply with their duties under the 2006 Regulations without a reasonable excuse. In other words, the absence of a reasonable excuse should be understood as an element of the offence itself.

20. Proof of a negative was not an easy thing, Mr Adamou submitted. It would be difficult for a person to prove, other than by their own uncorroborated evidence, that they were unaware of a state of affairs or a particular fact, and much more practical for a prosecutor to prove the converse, that someone was aware of a fact by evidence of relevant information being conveyed to them or of circumstances which led to only one reasonable conclusion.

21. Mr Adamou relied on two decisions of the Court of Appeal in support of his submissions. These were cases in which the burden of disproving the existence of a reasonable excuse had been found to fall on the prosecutor.

22. In *R v Evans* [2004] EWCA Crim 3102 the defendant was convicted of breaching a restraining order made under section 5 of the Protection from Harassment Act 1997. Section 5(5) of the statute provided that "If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence." At [21] Dyson LJ considered the burden of proof created by that provision:

> "… a defendant who is alleged to have acted in breach of a restraining order contrary to section 5(5) of the 1997 Act has the protection that the prosecution must prove that he or she has acted "without reasonable excuse". Thus, for example, there may be cases where there is room for legitimate differences of view as to the meaning of a restraining order. If in such a case the defendant raises the issue that he or she believed that the conduct of which complaint is made was permitted by the order, the prosecution will have to prove that he or she did not have reasonable excuse for the prohibited conduct. Acting under a reasonable misapprehension as to the scope and meaning of the order is capable of being a reasonable excuse for acting in a manner which is prohibited by the order."

23. *R v Charles* [2009] EWCA Crim 1570 concerned the offence of breaching an ASBO contrary to section 1(10), Crime and Disorder Act 1998, which provides that: "If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence." The issue in the appeal was whether the legal burden of proving whether a defendant acted without reasonable excuse rested on the Crown or the defence. Having referred to *Edwards* and *Hunt*, the Court of Appeal held that it fell on the prosecution to show an absence of reasonable excuse.

24. On behalf of the City Council, Mr Whatley pointed out the offences under the Crime and Disorder Act 1998 and the Protection from Harassment Act 1997 which were under consideration in *Charles* and *Evans* shared certain common characteristics. In each case the absence of reasonable excuse was clearly incorporated as an ingredient of the offence itself by the formulation "If without reasonable excuse a person does anything which he is prohibited from doing …., he is guilty of an offence". Moreover, in each instance the effect of the statute was to criminalise behaviour that would not otherwise be criminal.

25. I agree with Mr Whatley that the authorities relied on by Mr Adamou are illustrations of the types of statutory provision referred to by Lord Griffiths in the passage from *R v Hunt* which I have cited at [15] above as presenting particular difficulties of construction because "what might be regarded as a matter of defence appears in a clause creating the offence". Such provisions may be contrasted with offences to which a specific defence is identified in a separate statutory provision; in the latter type of case "it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it".

26. The proper construction of section 234 of the Housing Act 2004 is clear. There is no justification for ignoring the separation of the elements of the offence and the defence.

27. The offence of failing to comply with a relevant regulation is one of strict liability, subject only to the statutory defence. The elements of the offence are set out comprehensively in section 234(2). Those elements do not refer to the absence of reasonable excuse which therefore does not form an ingredient of the offence, and is not one of the matters which must be established by the prosecutor. Section 234(4) provides, separately from the description of the defence itself, a single defence of reasonable excuse. The burden of proving a reasonable excuse falls on the defendant.

28. It is common ground in this appeal that the defence need only be established on the balance of probability. That is clearly correct.

29. I do not accept Mr Adamou's submission that it will be excessively difficult for a defendant to a criminal charge, or an appellant against a civil penalty, to establish even to the civil standard that they had a reasonable excuse for conduct amounting to the relevant offence. On the contrary, the landlord or other person managing an HMO will know why they failed to comply with the 2006 Regulations. If, as in this case, their omission was because they are said to have been unaware the property was occupied by more than one household they will be able to give evidence of their state of knowledge. The local housing authority, on the other hand, has no means of knowing the state of knowledge of a landlord or manager and very limited powers and resources to enable with which to investigate that question. There is nothing in the subject matter of the defence which makes it improbable that Parliament should have intended the burden of proving the existence of a reasonable excuse to fall on the person asserting the defence.

30. In this case Mr Roberts gave evidence that he was unaware that the property was an HMO but the FTT was not persuaded. In paragraph 51 of its decision it gave five separate reasons why Mr Roberts "either knew, or ought to have known, that the premises were being used as an HMO". The question for the FTT was whether the appellant had a reasonable excuse for not complying with the 2006 Regulations. If Mr Roberts knew the property was an HMO (and he was an experienced letting agent) he had no excuse. If he did not know, the FTT considered that he ought to have known, by which I take it to have meant that his excuse for failing to comply with the Regulations was not a reasonable one.

31. I would add, finally, that the issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence.

32. In my judgment the FTT was entirely correct in its approach to the allocation of the burden of proof in this case. The same approach also applies to the other offences identified as relevant housing offences under section 249A(2), Housing Act 2004, for each of which a separate defence of reasonable excuse is provided for.

33. For these reasons the appeal is dismissed.

Martin Rodger QC,
Deputy Chamber President
19 March 2020