UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – SITE LICENSING – burden and standard of proof on appeal against compliance notice – s. 9A, Caravan Sites and Control of Development Act 1960

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

BETWEEN:

SHELFSIDE (HOLDINGS) LTD

Appellant

and

VALE OF WHITE HORSE DISTRICT COUNCIL

Respondent

Re: Ladycroft Mobile Home Park,
Blewbury,
Oxfordshire

Determination on written representations

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The following case is referred to in this decision:

In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563

Secretary of State for the Home Department v Rehman [2001] UKHL 47

Shelfside (Holdings) Ltd v Vale of White Horse District Council (No.1) [2016] UKUT 400 (LC)

Introduction

1. Since 1960 it has been an offence under section 9(1) of the Caravan Sites and Control of Development Act 1960 for the occupier of a protected site to fail to comply with a condition attached to a site licence granted under Part I of the Act. In 2013 the licensing regime in England was enhanced by the introduction of a new system of compliance notices provided for by amendments to the 1960 Act introduced by section 4 of the Mobile Homes Act 2013.

2. Under section 9A(1) of the 1960 Act (as amended), where it appears to a local authority that the occupier of a protected site has failed to comply with a condition attached to a site licence for that site, the authority may serve a compliance notice requiring the occupier to comply with the condition. The occupier of the site has a right to appeal against a compliance notice to the first-tier tribunal.

3. Under section 9B of the 1960 Act, a failure by the occupier of a protected site to take the steps specified in a compliance notice is a criminal offence punishable by a fine. In any prosecution under section 9B the elements of the offence would have to be proved to the criminal standard of proof, beyond reasonable doubt.

4. The main issue in this appeal is whether, on an appeal to the First-tier Tribunal (FTT) against a compliance notice, the tribunal may only confirm the notice if it is satisfied beyond reasonable doubt that the occupier has failed to comply with the relevant condition of the site licence, or whether it need only be satisfied to the civil standard of proof, on the balance of probability.

5. Shortly after permission to appeal was granted by the FTT in this case this Tribunal determined this issue in other proceedings between the same parties concerning the same protected site, Ladycroft Mobile Home Park at Blewbury in Oxfordshire ("the Park").

The compliance notice

6. The Park is subject to a site licence granted to the appellant by the District Council on 18 May 2015. Amongst other matters the licence regulates the permitted distance between mobile homes and other structures on the Park including boundaries and other mobile homes. In *Shelfside (Holdings) Ltd v Vale of White Horse District Council (No.1)* [2016] UKUT 0400 (LC), to which I will refer later, the Tribunal considered an appeal against a decision of the FTT given on 6 November 2015 in which it had confirmed two compliance notices served by the District Council on 2 July 2015. The subjects of those compliance notices were two mobile homes on the eastern boundary of the Park which were located too close to one another and one of which was also too close to the eastern boundary itself.

7. The compliance notice with which this appeal is concerned was served on 26 November 2015, and was one of seven notices served on that date. The proceedings

before the FTT concerned challenges to several of those notices, but only one remains in issue. It required compliance with condition 4(d)(iii) of the site licence which in turn requires that any structure, including steps, ramps etc (except a garage or carport) which extends more than 1 metre into the separation distance between two homes must be of "non-combustible construction". The details given in the notice of the appellant's alleged non-compliance were the following:

> "A new mobile home (northern boundary unit 2) has been sited in the area indicated on the attached plan with steps/veranda that are wider than 1m and appear to be of a traditional construction (i.e. not non-combustible) in contravention of condition 4 d iii."

The steps which the notice required the appellant to take to ensure that the condition was complied with were either to remove or to replace the steps and veranda so that they fully complied with the condition.

The appeal to the FTT and its decision

8. The basis of the appellant's appeal to the FTT was that there had been no failure of compliance because the steps providing access to the home were made of aluminium clad with uPVC, which the appellant maintained is a non-combustible material. The District Council took the opposite view and considered that uPVC is a combustible material. At the hearing before the FTT neither party relied on any admissible expert evidence to substantiate its position.

9. At that hearing the appellant produced a product information sheet and the result of technical investigations relating to a proprietary material called "Hampton decking". The test results did not identify who had commissioned the investigation, but as they appeared to be part of a single document including the product information sheet the obvious inference is that they were prepared for the manufacturer. The information sheet described the material as "made entirely from thermoplastics" and as "UL-94 V-0 fire rated meaning that it will not ignite, hold a flame or burn". The FTT pointed out that there was no evidence that the material used to construct the steps and veranda was "Hampton decking"; on the contrary, the product information related to decking of 2.63mm thickness and not to steps, cladding, balusters or handrails. Nevertheless, the FTT said, it was open to the appellant to provide sufficient information to the District Council concerning the properties of the material used in the steps and veranda to demonstrate that it was not combustible, but it had not yet done so.

10. The FTT referred to a letter written to the appellant by Mr Coleman, the District Council's compliance officer, after an inspection on 30 September 2015. The letter drew attention to the fact that the steps and veranda appeared to be constructed of uPVC and requested an explanation of how, in those circumstances, the appellant intended to comply with condition 4(d)(iii) of the site licence. No response was received to that letter, nor to a chasing letter sent on 21 October. It was therefore against a background of apparent refusal by the appellant to engage with the District Council that the compliance notice was served on 6 November.

11. The FTT concluded that, in view of the appellant's refusal to acknowledged Mr Coleman's concerns, the District Council had been entitled to serve the compliance notice. It explained its conclusion in paragraph 66 of its decision, as follows:

> "It is a pity that Mr Sunderland [of the appellant] did not reply to Mr Coleman's enquiry; if he had done so this part of the case may not have been necessary. The Act provides that the Council may serve a compliance notice if "it appears" that there has been non-compliance. On inspection by Mr Coleman it appeared to him that the veranda and steps were constructed of uPVC which is generally a combustible material. He wrote to Mr Sunderland raising this point and it really is not tenable for Shelfside to refuse to reply to that enquiry and then object to the compliance notice because the Council did not know whether it was combustible or not. In the absence of a reply, the Council was entitled to conclude that it appeared to be combustible and the notice was justified. We therefore confirm it."

The appeal

12. The appellant sought permission to appeal to this Tribunal on the grounds that there had been no evidence before the FTT sufficient to satisfy it beyond reasonable doubt that the relevant condition of the site licence had not been complied with. The FTT did not consider that the criminal standard of proof applied in its proceedings, but nevertheless granted permission to appeal on the grounds that the standard of proof required in cases where the relevant legislation creates a criminal offence associated with its jurisdiction was a point of potentially wide implication which it was appropriate for the Upper Tribunal to consider.

13. In its grounds of appeal the appellant raises two issues. The first concerns the burden of proof: in an appeal against a compliance notice is the local authority required to prove that there has been non-compliance with a condition of the site licence, or is it for the occupier of the site to prove that there has been compliance? The second issue concerns the standard of proof: assuming that the burden is on the local authority to prove non-compliance with a condition of the site licence, must it do so beyond reasonable doubt, or only on the balance of probability? It is convenient to deal with the second of these issues first.

The standard of proof

14. The appellant's argument that the standard of proof in proceedings concerning non-compliance with a condition in a site licence should be the criminal standard is based on the following chain of reasoning. First, in order to prosecute the occupier of a protected site for the offence under section 9(1) of the 1960 Act of failing to comply with a condition in a site licence, the local authority would have to prove beyond reasonable doubt that there had been a failure to comply. Secondly, failure to comply with a compliance notice is an offence in its own right under section 9B, proof of which requires only proof of non-compliance with the notice and not proof of a prior failure to comply with a condition in the site licence (the section 9(1) offence). Therefore, it is argued, both the local authority and the FTT "need to be satisfied to

the criminal standard that there is non-compliance, otherwise there is a potential of creating an offence even if there is in fact compliance with the licence conditions".

15. This reasoning is not correct, as the Tribunal has already ruled in *Shelfside (Holdings) Ltd v Vale of White Horse District Council (No.1)* (a decision which had not yet been published when the FTT gave permission to appeal. In that case the appellant's target was the decision of the District Council to serve the July 2015 compliance notices. The Tribunal (His Honour Judge Bridge) said this, at paragraphs 37 and 38:

> 37. Section 9A(1) is clear. The local authority may serve a compliance notice on the occupier *if it appears* to that local authority that the occupier is failing or has failed to comply with a licence condition. There is no express reference to any standard of proof (criminal or civil) nor should any be implied. The local authority is not acting in a judicial capacity and adjudicating upon evidence adduced before it by parties to litigation. It does not, in serving a compliance notice, circumvent the criminal standard of proof that would have to be satisfied if it decided to prosecute the site occupier under section 9 for breach of condition.
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> 38. The compliance notice procedure is an alternative course of action to commencing a criminal prosecution. It is intended to be more flexible, and it can be adapted to the circumstances of the particular case; and in the event of the site occupier complying with the notice there will be no need to bring criminal proceedings. Criminal prosecution is punitive rather than remedial, is less nuanced and is likely to be used by local authorities as a last resort where invocation of compliance procedures is inappropriate or has been attempted and has proved to be ineffective. In the event of a criminal prosecution, whether under section 9 (for breach of a licence condition) or under section 9B (for failure to take steps required by a compliance notice), the criminal standard of proof will of course apply.

I agree. Moreover, on an appeal to the FTT against a compliance notice, the question for the tribunal is whether the facts stated in the notice are made out. In reaching its own conclusion on that question the FTT will apply the civil standard of proof.

16. The general principles concerning proof in civil proceedings are very well established and nothing suggested by the appellant in this appeal calls them into question. They are clearly laid down and explained in two decisions of the House of Lords, *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47. In the first of these Lord Nicholls of Birkenhead explained (at p 586C):

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception. …

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. …

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

17. That explanation is more than enough to dispose of the appeal on the issue of the standard of proof.

The burden of proof

18. The general rule in civil proceedings is that the party who asserts a fact must prove it. On an appeal to the FTT under section 9A of the 1960 Act against the service of a compliance notice the relevant facts are those asserted in the compliance notice itself, namely that the occupier of a protected site has failed to comply with a condition attached to the site licence for that site.

19. Although section 9A(1) permits a local authority to serve a compliance notice "if it appears" to it that there has been a failure to comply with a condition, those words should not be taken to dilute the requirement of proof of non-compliance if there is a challenge to the notice. It is not then the appearance of non-compliance which must be proved, but non-compliance itself.

20. An appeal under section 9A is said by section 9G(4)(a) "to be by way of a rehearing". That choice of language may appear slightly strange in this context, since there will not previously have been any process which could sensibly be referred to as a "hearing". Nevertheless, the intention is clear: on an appeal to the FTT against a compliance notice the FTT will not determine whether the local authority was entitled to conclude on the evidence available to it that there had been a failure to comply with a condition of a site licence, but will decide for itself whether there was or was not such a failure. When it does so, the FTT may have regard to matters of which the local authority was unaware (section 9G(4)(b)).

21. In its grounds of appeal the appellant asserts that the 1960 Act contains no provision that has the effect of requiring it to prove compliance with the site licence. I agree.

22. The appellant then complains that in this case the FTT impermissibly reversed the burden of proof by requiring it to prove that the material from which the steps and veranda were constructed was non-combustible. I do not agree that that is a correct reading of the FTT's decision.

23. The fact that the material in question was uPVC was not in doubt, as the appellant itself described it as "aluminium clad with uPVC". The issue was whether that material was combustible or non-combustible. The FTT described uPVC as "generally a combustible material". As an expert tribunal the FTT was entitled to make that assessment about the general characteristics of uPVC without the need for specific evidence, relying instead on its experience of and familiarity with building materials.

24. The position was therefore that, on the admission of the appellant, the structure was made of a material which the FTT knew generally to be combustible. Applying the civil standard of proof, those facts were sufficient in themselves to justify the conclusion that the prohibition in the licence condition on the use of combustible materials had been breached. If the appellant wished to resist that conclusion it was necessary for it to advance a positive case to rebut or contradict it, by providing evidence that, unlike the generality of uPVC, the uPVC used in this structure was non-combustible.

25. The flaw in the appellant's argument is that overlooks the fact that a point is often reached in proceedings where the evidence relied on by the party which has the burden of proof is sufficient to discharge that burden and will do so unless evidence is provided to counter it. In this case it was not necessary for the District Council to provide affirmative evidence that the material used in the construction of the steps and veranda had been tested and found to be combustible; it was sufficient for it to rely on the fact that, in general, material of the type used is combustible. Those matters having been established, the evidential burden of demonstrating that this particular material was different from uPVC in general then passed to the appellant, which failed to discharge it.

26. There was no evidence before the FTT to connect the product information about "Hampton decking" to the qualities of the material used in the construction of the steps and veranda. The structure did not display any sign of being made from that material and no witness provided evidence to suggest that it was. In those circumstances the FTT was entitled to conclude that the steps and veranda were combustible.

Disposal

27. In my judgment the FTT was entitled to come to the conclusion it did and I therefore dismiss the appeal. As the FTT pointed out, however, if the appellant is able to demonstrate that the material used in the construction of the steps and veranda is indeed "Hampton decking" or some other non-combustible material, it may provide the necessary proof to the District Council and request that it exercise its power under section 9A(5) of the 1960 Act to revoke the compliance notice.

Martin Rodger QC

Deputy Chamber President

21 June 2017