A dwelling but not a home

Miriam Seitler revisits the meaning of "dwelling" following a recent decision by the Upper Tribunal

Conveyancers acting for purchasers and investors in the buy-to-let market need to know whether they are the subject of the Landlord and Tenant Act 1985 (the 1985 Act) service charge regime and/or can make use of it if they are mesne landlords. In *JLK* v *Ezekwe* [2017] UKUT 277 (LC); [2017] PLSCS 146, the Upper Tribunal (Lands Chamber) answered that question and, in doing so, revisited the meaning of "dwelling".

The facts

The case concerned a block of 93 residential units which had formerly served as the headquarters of the Liverpool Fire Brigade. In 2012, the block was converted to provide units for occupation by students. The vast majority of the units contained a bed-sitting room with en suite bathroom facilities. Each unit was let on a long lease allowing use of communal kitchens and lounges on each floor.

Legal context

The question for the tribunal was whether the First-tier Tribunal was correct to conclude that it had jurisdiction to determine the amount of service charges which the leaseholders were liable to pay. The First-tier Tribunal would only have jurisdiction if the units were "dwellings", as defined by section 38 of the 1985 Act, namely "a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it".

The Upper Tribunal was asked to answer three questions: (1) Whether, for a unit of accommodation to be a dwelling for the purposes of the 1985 Act, it is necessary that it should be used, or be intended to be used as someone's home; (2) If so, whether the units in this case satisfy that test; and (3) Whether, in any event, each of the units in this case are occupied or intended to be occupied as a "separate dwelling" in light of the availability of communal kitchens and lounges.

Must a dwelling be occupied as someone's home?

The landlord relied on three cases to argue that a dwelling had to be occupied or intended to be occupied as someone's home.

First, the landlord relied on *Uratemp Ventures Ltd* v *Collins* [2001] UKHL 43; [2001] 3 EGLR 93 including dicta which lent support to the view that "dwelling" connotes a place which the occupant regards and treats as his home.

Uratemp is one of the leading cases on the meaning of dwelling under the Housing Act 1988 (the 1988 Act). In it, the House of Lords considered whether a room in a hotel without any cooking facilities, either in the room or elsewhere in the building, could be considered a dwelling. The House of Lords held that it could; there was no requirement for cooking facilities to be included in order for premises to qualify as a dwelling. The court emphasised that "dwelling" is to be interpreted as an ordinary English word without a technical meaning.

> "The particular layout of a premises will often be determinative of whether it qualifies as a separate dwelling

Second, the landlord relied on *R (on the application of N)* v *Lewisham London Borough Council* [2014] UKSC 62, which considered the question of whether the Protection from Eviction Act 1977 applied to accommodation occupied by homeless families housed temporarily by a local housing authority. In order to attract the statutory protection, the accommodation had to be "occupied as a dwelling".

Lord Hodge, giving the leading judgment, had stated that the establishment of a home was a component of the activity of dwelling and therefore the occupants' residence did not have the necessary degree of permanence to qualify for protection.

Third, the landlord relied on the Lands Tribunal decision of *King* v *Udlaw Ltd* [2008] 2 EGLR 99 that the 1985 Act did not apply to holiday bungalows because these were not dwellings.

The Upper Tribunal dealt with these authorities as follows, concluding that occupying as a home was not a necessary component to qualify as a dwelling. First, *Uratemp* was not of direct application because dwelling meant something different in a different statutory context. In particular, to attract protection under the 1988 Act the tenant had to occupy as his "only or principal home". Further, in the definitions in both the Rent Act 1977 and Housing Act 1988 the term dwelling was used to describe both the subject matter and purpose of the tenancy, whereas in the 1985 Act the same duplication did not exist.

Second, the tribunal declined to follow *King*, describing the reasoning as "difficult". In the Tribunal's view, *King* had unjustifiably extended *Uratemp* beyond its statutory context.

Curiously, the tribunal did not directly address *R (on the application of N)*. Presumably the tribunal regarded that case as another example of the meaning of dwelling being specific to a certain statutory context. However, it is notable that the point about the statutory wording of the definition, made by the Upper Tribunal in respect of the Rent Act 1977 and the 1988 Act, cannot be made about the Protection from Eviction Act 1977. That decision, and the question of the meaning of dwelling in a particular context, appears to be influenced by policy rather than statutory interpretation alone.

Are the units occupied as separate dwellings?

The landlord argued that the leases involved the shared use of living space such as kitchens and lounges with tenants of other units. Relying on the line of case law starting with *Neale* v *Del Soto* [1945] 1 KB 144, the landlord argued that although shared bathrooms did not take the occupation outside the definition of separate dwelling, sharing of a kitchen did. Crucially, the position at common law is alleviated, in respect of the Rent Act 1977 and the 1988 Act, by the statutory deeming provision which brings a premises back within the scope of those Acts so long as the living space is not shared with the landlord.

The Upper Tribunal noted, however, that there is no equivalent deeming provision in the 1985 Act. Therefore the common law rule applied so the sharing of living accommodation with other tenants had the effect that the dwelling was not occupied as a separate dwelling.

Given the unlikelihood of student accommodation consisting of separate units each with their own kitchen, it seems that the practical result is that student lettings will not attract protection under the 1985 Act.

Be particular

JLK is a reminder that (i) the meaning of "dwelling" is not the same in each statute and care needs to be taken to establish the precise meaning in a particular statutory context and (ii) the particular layout of a premises will often be determinative of whether it qualifies as a separate dwelling.

Miriam Seitler is a barrister at Landmark Chambers and a contributing editor to the private residential tenancies chapter of Hill and Redman