



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BC/HMF/2021/0058**

HMCTS code : **V: VIDEO**

Property : **149 High Road, South Woodford,
London, E18 2PA**

Applicant : **(1) Mr Jonathan Mckay
(2) Ms Christiana Koloko-Fashakin**

Representative : **Ms Clara Sherratt, Justice for
Tenants**

Respondent : **Ms Louise Kargotis**

Representative : **In person**

Type of Application : **Application for a rent repayment
order by a tenant**

Tribunal Members : **Tribunal Judge Prof R Percival
Ms S Coughlin MCIEH**

**Date and venue of
Hearing** : **27 August 2021
Remote**

Date of Decision : **18 November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using VHS. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing.

Decision and order

(1) The Tribunal finds that the Respondent did not commit the alleged offence in the period of 12 months before the date of the application for a Rent Repayment Order and accordingly no rent repayment order may be made.

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants half of the application and hearing fees, which is £150.

The application

1. On 17 February 2021, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“the 2016 Act”) for Rent Repayment Orders (“RROs”) under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 14 April 2021. The two Applicants applied for RROs covering the periods from 28 February 2019 to 6 March 2020 and 1 July 2020 to 29 November 2020.
2. In accordance with the directions, we were provided with an Applicant’s bundle of 119 pages, plus a response of 59 pages, and a Respondent’s bundle of 174 pages.

The hearing

Introduction and representation

3. The property is on two stories over a shop, with two bedrooms on each floor. In view of our conclusions, we do not set out the history of occupation and rents paid.
4. Ms Clara Sharrett of Justice for Tenants represented the applicants. The Respondent appeared in person, and was assisted by her daughter, Ms Carn Kargotis.

The alleged offence

5. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 (“the 2004 Act”), section 72(1). The

offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

6. The Applicants case is that the property was situated within an additional licensing area as designated by London Borough of Redbridge (“the council”). The additional licencing area came into force 13 April 2017, and currently remains in force; the selective scheme came into force on 1 October 2018, and also currently remains in force.
7. The Respondent does not argue that she was, in fact, licenced during the relevant period. She does, however, rely on the two statutory defences in section 72. These are:
 - “(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time –
 - (a) ... , or
 - (b) an application for a licence had been duly made in respect of the house under section 63
 - (5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse–
 - (a) for having control of or managing the house in the circumstances mentioned in subsection ...”
8. In her written statement, the Respondent states that she applied for a licence on 7 January 2020, but that “payment had not gone through so [I was] unaware that the application had not been processed. ... the automated message on the application showed ‘COMPLETED’”. She subsequently – in January 2021 – received a “final demand” for the application fee, which she initially thought was for the balance of the fee, some of which she thought she had paid at the time of the application. She exhibited the email from the council, dated 26 January 2021, and her reply (on 31 January 2021) referring to the “balance”, which she was having trouble paying via the council’s systems. At some later point, she contacted the council, and was told that the council had failed to notice the lack of payment as a result of the disruption at that time caused by the Covid-19 pandemic.
9. In her oral evidence, on cross-examination, she expanded on this account. She said that she became aware of the relevant licensing scheme because her builder mentioned it to her when she was undertaking some refurbishing work in late 2019. That was why she applied for the licence in January 2020.
10. Ms Sharrett asked the Respondent about two documents that she had exhibited. Both are screen shots from the council’s website application form for a licence. The first is clearly (if in small print) dated 07/01/2020, and appears to be a website page of the familiar sort

which gives the user a running account of how far through a form they have got. It says “section 15 of 15” and on the next line “100% complete”. The force of Ms Sharrett’s cross examination was that, as users would usually understand, this would mean that the user had filled in the relevant sections, but not that it had been completed in the sense that it was now submitted and with the council.

11. On the next page in the Respondent’s bundle was a similar screen shot, at the top of which appears the words “Application for New Application for Additional Licence”. Below that, on separate lines are the words “Thanks for completing the application” and “We are awaiting the results of a visit from an enforcement officer”.
12. However, at the top left hand corner, where the date appeared on the preceding page, there was no date, but rather a faint jagged line. Ms Sharrett asked the Respondent why there was no date on this page. We should add that both members of the Tribunal had also noticed this apparent discrepancy, which appeared capable of founding a suspicion that a page from the successfully completed and submitted application in 2021 had been inserted, with the date removed. We had both resolved to ask about the issue, had Ms Sharrett not done so.
13. The Respondent and her daughter were sitting together (with our permission) with the papers at their home. Rather than using the same pdf bundle as the other participants, they were using the paper files, not put together in the same order, from which they had compiled the pdf bundle. They were evidently confused by Ms Sharrett’s question. It became apparent that the reason was that the date – 07/02/2020 – clearly appeared on the original of the document, which they were using, in the same position as the preceding document. The Respondent’s daughter held the original up to the camera for us to see. It is clear that what had happened is that the date on this page had accidentally not been reproduced when a staple had been removed for the process of scanning (or possibly photocopying) the page to produce the pdf bundle.
14. Ms Sharrett cross-examined the Respondent on why she did not notice that the fee – £313 – had not been taken from her account, and why she did not follow up the next stage of the process for a full year.
15. The Respondent said that she did not routinely undertake a process of reconciling expected expenditure with withdrawals from her account. She might check up a payment if there was an issue with it, but that did not, in her understanding, apply here. She confirmed that she did check that rent payments had been received.
16. As to following up, she said that she had telephoned the council, and been told that visits were on hold as a result of the Covid-19 pandemic.

17. Ms Sharrett addressed us in relation to the defences. In respect of the defence in section 72(4)(b), she said that an application was “duly made” only when all necessary steps had been taken, which included payment of any fee. In normal circumstances, she said, the fee was paid when the application was submitted, not a year later. She accepted that the application was started in 2020, but, she argued, not completed.
18. As to the defence in section 72(4)(b), Ms Sharrett argued that she had made no effort to complete the application before the “final demand” email. It should have been clear to her that she had not paid. It was not unreasonable to expect her to check her bank statement. She further said that there was no evidence in the form of exhibited correspondence to support her contention that she had been told that visits by enforcement officers had been suspended.
19. In answer to a question from us, Ms Sharrett made it clear that she was submitting both that the Respondent did not genuinely believe that she had submitted an application, and that it was not objectively reasonable for her to have behaved as she did.
20. In respect of the defence in section 72(4), we agree with the Applicants. The defence is entirely objective. An application is either “duly made”, or it is not. Section 63(2) and (3) of the 2004 Act provide that an application must be made in accordance with whatever requirements the council specifies, and that the council may require an application to be accompanied by a fee. It is clear that the fee is one of the “requirements” an authority is allowed to make, and an application must be made “in accordance” with such requirements. Failure to pay a fee therefore means that an application has not been made.
21. However, we consider that the defence in section 72(5) is made out.
22. We believe on the balance of probabilities that the Respondent did genuinely believe that she had made an application. First, we found her a forceful, occasionally even belligerent, witness, who was confident in her own rectitude and dismissive of the concerns or views of others. We have made observations on her conduct as a landlord below. However – indeed, by the same token – we considered her to be an honest witness. Her conduct at the time of the incident in cross-examination we set out above was, we consider, unfeigned and honest.
23. Secondly, and for similar reasons, we consider it inherently unlikely that she would have deliberately failed to complete the application. It is not plausible that she would have risked the adverse consequences she would potentially face to merely delay the payment of the moderate fee involved. Further, we were not convinced by Ms Sharrett’s argument, at least implied in cross-examination, that she might have feared the cost of additional work. She (quite possibly mistakenly) was clearly of the view that her property was of a sufficient standard to secure a licence,

and she (more or less) immediately applied for one once the issue was raised in 2021, without undertaking further work.

24. Finally, the factors that we set out below in relation to reasonableness obviously also apply to consideration of genuine belief.
25. A harder question is whether it was reasonable to believe that she had made an application. It is evident, we consider, that an objectively reasonable belief that one has made an application is capable of constituting a reasonable excuse for not doing so.
26. We conclude that, in the circumstances, it was a reasonable belief.
27. First, the unfortunate way in which the council's website expressed itself is amply sufficient to give rise to a reasonable belief that all steps required of the applicant in respect of the application for the licence had been taken. If only the penultimate page were available – that which announced 15 out of 15 steps complete – we would have had doubts. However, the final screen not only expressly stated that the application was complete, it also clearly implied that the next thing to happen to progress the application was that the council's enforcement officer would arrange a visit to the property. In other words, that the ball was now in the council's court.
28. The question then becomes whether a reasonable landlord would have chased the process after a certain time. In principle, a reasonable landlord would do so. But the evidence here is that the Respondent did, by telephoning the council, and receiving the reply that enforcement visits had been suspended because of the pandemic. We have had no independent evidence as to whether enforcement visits were in fact suspended, but we know that similar steps were taken by many employers as a result of the pandemic and the legal changes it precipitated. In the entirely exceptional circumstances obtaining throughout the period from (at least) March 2020 until well into 2021, it was entirely reasonable not to expect normal service to be resumed by the council.
29. Finally, we do not think that the Respondent's failure to track down whether or not the fee that she thought she had paid had been taken out of her account is sufficient to render her conduct during the period unreasonable. Some landlords might do so as a matter of course, others might not, and we do not see doing so as a pre-condition to a landlord being seen as acting reasonably in connection with expenditure.
30. As a result, the Respondent has demonstrated on the balance of probabilities that she had a reasonable excuse for controlling or managing the property without a licence from the date on which the

council's computer showed the application as being complete, 7 January 2020.

31. In so far as the RRO application was for the period preceding 7 January 2020 we note that the application was received on 17 February 2021. Section 41(2)(b) requires that the offence must have been committed in the period of 12 months before the application was made. The Tribunal therefore has no jurisdiction in relation to the period before 7 January 2020 and so cannot make an RRO for this period.

Further observations

32. We heard substantial evidence as to the conduct of the parties. Had we made a rent repayment order, the amount of that order would be influenced by the respective conduct of both parties. Since we have concluded that no criminal offence was committed in the 12 month period before the application was made, it is not necessary for us to make any findings as to the parties' conduct insofar as it might impact on the amount of a rent repayment order.
33. However, we feel it would be appropriate, first, to say that no proper complaint at all could be made of the tenants' conduct. Had we needed to do so, we would have wholly rejected the Respondent's attacks on their conduct. At no time did they behave other than was entirely reasonable for tenants.
34. Secondly, it may be of some assistance to the Respondent if we tell her that, had we been in a position to have made an order, her conduct as a landlord would have told against her in terms of the size of the order. To take some examples, it is incumbent on landlords to ensure that they have the means in place to inform themselves of their legal responsibilities, which go much wider than rent repayment orders. Relying on a builder to inform a landlord of their legal responsibilities is not satisfactory. Landlords should not expect tenants to routinely waive their rights under a tenancy in order to accommodate a landlord's builder's convenience. Telling a tenant that they should look elsewhere if they seek to exercise clear rights under a tenancy agreement is poor practice.

Application for reimbursement of application and hearing fees

35. While we have found against the Applicants, not only was it reasonable to make the application, but to a considerable degree the Respondent brought the application upon herself as a result of her treatment of the tenants.
36. In these unusual circumstances, we consider that it would be fair and equitable if the parties shared the cost of the application and hearing fees.

37. Accordingly, we order under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse half of the application and hearing fees, which is £150. The Respondent must pay that sum to the Applicants.

Rights of appeal

38. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.
39. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
40. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
41. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 18 November 2021

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Housing and Planning Act 2016

40 Introduction and key definitions

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –
- (a) repay an amount of rent paid by a tenant, or
 - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
7	This Act	section 21	breach of banning order

- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if –
- (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - (b) the offence was committed in the period of 12 months ending with the day on which the application is made.
- (3) A local housing authority may apply for a rent repayment order only if –
- (a) the offence relates to housing in the authority’s area, and
 - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

42 Notice of intended proceedings

- (1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.
- (2) A notice of intended proceedings must—
- (a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,
 - (b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days (“the notice period”).
- (3) The authority must consider any representations made during the notice period.
- (4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined with –
 - (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in this table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

- (3) The amount that the landlord may be required to repay in respect of a period must not exceed –
 - (a) the rent in respect of that period, less
 - (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

- (4) In determining the amount the tribunal must, in particular, take into account –
- (a) the conduct of the landlord and the tenant,
 - (b) the financial circumstances of the landlord,
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.