FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/43UM/HMG/2019/0002**
Property	**:**	**Flat 6 Jarman Court, 68 Maybury Road, Woking, Surrey GU21 5JD**
Applicants	**:**	**Denise Gomez Beltrami** **Jefferson Kruger Robinski**
Representative	**:**	
Respondent	**:**	**Woburn 6 Limited**
Representative	**:**	**Hughes Paddison, solicitors and Ms Kleopa of counsel**
Type of Application	**:**	**Tenants' application for a Rent Repayment Order**
Tribunal Members	**:**	**Judge D Agnew** **Mr M Donaldson FRICS**
Date and venue of Hearing	**:**	**20th November 2019 at Havant Justice Centre**
Date of decision	**:**	**2 December 2019**

DECISION

The Application and Background

1. By an application received by the Tribunal on 30th July 2019 the Applicants applied to the Tribunal under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a Rent Repayment Order against the Respondent in respect of rent which they had paid to their Landlord, the Respondent, for Flat 6 Jarman Court, Woking, Surrey GU21 5JD ("the Property"). The ground for the application was that the Respondent was a person who had committed an offence under section 95(1) of the Housing Act 2004, namely, the control or management of an unlicensed house.

2. The repayment sought was for the sum of £2058 representing rent paid from 1st April 2018 (the date when the property was first required to have a licence under selective licensing) to 8th June 2018 when the Applicants moved out of the Property. The Applicants also seek an order under the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (Rule 13(2) for the return of fees.

3. The application came before the Tribunal for hearing on 20th November 2019. The Tribunal had before it the application form and statements from the Applicants as well as a statement of case and a bundle of documents referred to therein by the Respondent. The Applicants appeared in person. The Respondent was represented by Ms Kleopa of counsel.

The applicable law

4. By section 41 of the Housing and Planning Act 2016 ("the 2016 Act"):-

"(1) A tenant….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-

(i) the offence relates to housing which at the time of the offence was let to the tenant, and

(ii) the offence was committed in the period of 12 months ending with the day on which the application is made.

5. By section 43 of the 2016 Act:-

"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 has been convicted)."

6. By section 44 of the 2016 Act:-

"(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 the rent paid during the period mentioned in the table."

In this case the period shown in the table is "a period not exceeding 12 months, during which the landlord was committing the offence"

7. By section 44(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."

8. By section 40(3) of the 2016 Act a reference to "an offence to which this Chapter applies" is to an offence of a description specified in the Table below which includes an offence under section 95(1) of the Housing Act 2004 (control or management of an unlicensed house).

The Applicants' case

9.Included with the Application Form was an email from the Housing Standards Department of Woking Borough Council confirming that the Council had implemented a selective licensing scheme from 1st April 2018 for all private residential landlords and that the Property came within the scheme area. The email confirmed that the Property was unlicensed from 1st April 2018 until 8th June 2018 when the Applicants moved out.

10.The Applicants produced proof of the rent paid during that period amounting to £2058.51. The Applicants also sought a return of the application fee of £100.

The Respondent's case

11.Ms Kleopa said that the Tribunal had first to be satisfied beyond reasonable doubt that the Respondent had committed the alleged offence. She submitted the on the facts of this case the Tribunal could not be sure that the Respondent had committed the offence. The evidence was that the Respondent had, through its managing agent, made an application for a licence before the coming into force of the Selective Licensing Scheme which said application had not been refused or withdrawn and this is a defence under section 95(3)(b) of the Housing Act 2004. Alternatively, Ms Kleopa says, the Respondent had a reasonable excuse for failing to obtain a licence between 1st April 2018 and 8th June 2018. This is a defence under section 95(4) of the 2004 Act.

12. The timeline of events relevant to this case are as follows:-
1) On a date in 2018 which Ms Kleopa did not know (but before March 2018) the Respondent instructed Rampton Baseley Bellevue Limited, a firm of estate agents and letting agents to manage the Property.
2) On 27th March 2018 Rampton Baseley became aware that a Selective Licence Scheme was about to come into effect with regard to the Property on 1st April 2018.
3) On 28th March 2018 the property manager at Rampton Baseley, Louise Humphrey, tried to download a licence application form from Woking Borough Council's website but found that the website was down.
4) On 29th March 2018 she emailed a government website requesting that she be sent an application form to complete. That email did not reach the recipient until after the Bank Holiday weekend on 3rd April 2018. The advice was to download an application form from the same web page.

5) On 11th June 2018 in an email responding to a request from another member of Rampton Baseley to know whether the selective licensing for Jarman Court had been finalised, Louise Humpphrey replied that "the webpage was down when I tried to do it so I produced a document and posted it. I contacted them [the Council] a couple of times to the point I think they got annoyed and said they would contact me as and when the documents were received. I have not heard anything back since." She was urged to keep chasing the Council up.
6) On 13th June 2018 Louise Humphreys was asked to send Mari Wehmeyer at Rampton Baseley proof of posting the application form as they would have to "explain what happened and ask the landlord for money [the application fee]". Louise replied the same day saying she had just phoned Woking Council who said that "no application for a licence had come up from the post department, therefore they may possibly be behind". When told that this dated back to end of March/beginning of April she was told that it must have got lost in the post and that a fresh application would have to be made. On the same date Louise Humphrey stated in an email that she "forgot to get proof [of posting] because she was "in a rush and I done (sic) it out of my own expenses".
7) On 27th July 2018 a copy Selective Licence Application Form was sent to a different person at Rampton Baseley (Lana).
8) On 31st July 2018 Lana asked for "a lot of legal information required from both the landlord and agency" in order to be able to complete the form.
9)On 5th September 2018 the application form was sent to the Council and was received on 6th September 2018.
On 14th May 2018 the HMO licence was granted by the Council.

13.Ms Kleopa submitted that an application for a licence is "made" when it is posted to the local housing authority. She prayed in aid the postal rule under the Interpretation Act 1978 where service of a document is deemed to have been effected in the ordinary course of post. Although there is no certificate of posting, no copy application form duly completed by Louise Humphreys in evidence and no covering letter to the council showing that it was posted prior to 1st April 2018 Ms Kleopa asked the Tribunal to find that there was reasonable doubt that the application had not been made prior to 1st April 2018. Although there was no witness statement from Louise Humphrey Ms Kleopa asked the Tribunal to find, based on the email evidence, that an application was sent to Woking Council by post prior to 1st April 2018. In particular she relied on the emails of 27th to 29th March 2018. These show that the Respondent's managing agents were aware of the need to apply for a HMO licence for Jarman Court prior to 1st April 2018, that they were aware that if applied for before 1st April there would be no fee payable to the local housing authority but thereafter there would be a fee of "just over £500 per property" and that they had obtained the landlord's property manager's instructions to proceed to obtain the necessary licence. They also show that Louise Humphreys of Rampton Basely tried to download the licence application form from Woking Borough Council's website but was unable to do so as the web page was down and so she emailed the government website to explain the problem and asked to be sent an application form. This email was not received until 3rd April 2018 (the first working day after the Bank Holiday) when a reply was sent advising that the form could be downloaded from a link to that email. The Respondent also relies on an email of from 12th June 2018. In response to a query from another member of Rampton Baseley, Louise Humphrey explained that the web page was down when she

tried to apply for an application form so she "produced a document and posted it".

14. In support of her argument that the Respondent has a reasonable excuse for controlling or managing an unlicensed house (which would also be a defence to the alleged offence) Ms Kleopa points to the emails referred to in paragraph 8 above and to a further string of emails in June 2018. On 11th June 2018 Louise Humphreys reported that she had contacted the Council "a couple of times". She thought they got annoyed with her and said they would contact her as and when the documents were received. When asked by Mari Wehmeyer of Rampton Baseley to provide proof of posting of the original application form and any correspondence with the Council explaining why she had been unable to apply "in time", Louise Humphreys wrote in an email of 13th June 2018 that she had just spoken to a lady at Woking Council who had confirmed that nothing had been yet received from their post department and when explained that "this does date back to the end of March/ beginning of April" she was told that "it must have got lost in the post" and that she would have to try again. In the event a successful application was received by the Council on 6th September 2018 and the licence was eventually issued on 15th May 2019. Ms Kleopa submitted that this showed that there were inefficiencies at the Council in firstly having a website which appears to have crashed at a vital time and in the length of time it took to process the application. In those circumstances the Tribunal could not be sure that it was not the council's fault that the application took until 6th September 2018 for the Council to acknowledge that an application had been received.

The Tribunal's decision on whether an offence has been committed by the Respondent

15. The Tribunal has to be satisfied beyond reasonable doubt that the Respondent committed an offence. If it has a defence then the offence has not been committed. The offence is that of control or management of a house which is required to be licensed under the Housing Act 2004 without a licence (section 95(1) of the 2004 Act). The Respondent did not seek to argue that it did not control or manage an unlicensed house. (section 95(1) of the 2004 Act).

16.The Tribunal first considered the Respondent's defence that an application for a licence had been made prior to 1st April 2018. In order to determine this the Tribunal had to decide when an application is "made". Is it made when an application form is posted to the local housing authority, when it is "deemed" to have been received by the authority, or is it "made" when a properly constituted application is received by the authority? The Tribunal has no hesitation in finding that an application is "made" when it is received. The Interpretation Act 1978 has no application in these circumstances. That Act applies only where an Act of Parliament authorises or requires a document to be served by post. There is no such authorisation or requirement in the Housing Act 2004. Even if the Interpretation Act did apply, it only covers a letter containing the document which is properly addressed, prepaid and posted. In this case there is no evidence at all as to the content of the application (and in particular whether it complied with the regulations covering licence applications) purportedly made prior to 1st April 2018, the address to which it was sent or the amount of any

postage applied. There is no certificate of posting and the evidence as to the date when it is alleged to have been posted is vague. Furthermore, the Interpretation Act 1978 simply deems service to have been effected in the ordinary course of post (unless the contrary is proved). Without evidence as to what, if any, postage was applied, it cannot be deemed to have been served on any particular date.

17. In the Tribunal's opinion the ordinary and natural meaning of when an application is "made" is when an application complying with the regulations is received by the Council. Until that time the authority can be under no duty to consider an application and subsequently grant or refuse it because they are unaware of the application. To find otherwise would lead to great uncertainty as to when the application was "made." Further, the application has to be properly constituted and, if appropriate, the correct fee paid. As stated above, there is no evidence in this case as to what the purported application comprised and even if a proper application had been posted prior to 1st April 2018 it is highly likely it would not have been received in the ordinary course of post until after that date (the 30th March 2018 being a Bank Holiday) and so a fee would have been payable. It is clear even on the Respondent's case that no fee was tendered with the original application.

18. The Tribunal finds support for its construction of the word "made" from the different although analogous situation with regard to the making of applications in court proceedings where Rule 23(5) of the Civil Procedure Rules states that "Where an application [to the court] must be made within a specified time, it is so made if the application notice is received by the court within that time".

19. The Tribunal finds that the Respondent has failed to raise a reasonable doubt that the application was not made (i.e. received by the Council) before 1st April 2018. There is no witness statement from Louise Humphrey, there is no certificate of posting, there is no covering letter sending the application, there is no evidence of what was sent, there is no evidence of the address to which the application, if sent at all, was sent or that the correct postage was applied. There is no reasonable doubt in those circumstances.

20. The Tribunal moves on to consider whether there was a reasonable excuse for not applying for a licence between 1st April 2018 and 8th June 2018. The attempt to place blame upon the Council for the delay in submitting a proper application was not an attractive one. Rampton Baseley were aware (albeit late in the day) of the need to apply for a licence for the property on 27th March 2019. Although a tall order, they could and should have made every effort to submit the application before the deadline of 1st April 2018. Instead, they delegated the task to a new property manager (Louise Humphrey) who had never done such an application before and, clearly, had little idea of what it entailed. There seemed to be no appreciation from anyone at Rampton Baseley that failure to apply before 1st April 2018 would mean that the landlord was committing an offence. They were more concerned that a fee would have to be paid if the application were made after 1st April 2018.

21. Louise Humphrey did not follow up the application after 1st April 2018 with any great vigour. She says she telephoned the Council on a number of occasions to check that they had received the application but if she did, the alarm bells did

not ring that time was passing without any confirmation of receipt from the Council. Had she dealt with the matter competently she would have ensured that a fresh application was submitted after just a few days. It was not satisfactory to leave it to the Council to notify her of receipt of the form: it was not their duty to do so. If she had submitted a fresh application expeditiously it would have reduced the period of non-compliance considerably. It was not until over two months after the application should have been made that someone in Rampton Baseley checked to see whether the licensing had been effected that Louise Humphrey confessed what had happened but even then it took a further two and a half months for a completed application to be submitted.

22. The Tribunal finds that there was no reasonable excuse for the delay in making a proper application for a licence until 8th June 2018. Although the serious failings set out in paragraphs 20 and 21 above are those of Rampton Basely as opposed to the Respondent, the Respondent is nevertheless responsible for its agent's actions and if Rampton Baseley had no reasonable excuse then neither did the Respondent itself.

23. The Tribunal finds, therefore that the Respondent does not have a defence to the charge of being in control or management of an unlicensed house between 1st April 2018 and 8th June 2018 and so now proceeds to determine the amount of the penalty.

The amount of the penalty

24. It is agreed by the Respondent that the maximum amount of the penalty that the Tribunal may order in this case is £2,058. Ms Kleopa submitted that the Tribunal should order a penalty that is lower than the maximum, after taking the various factors set out in section 44(4) of the Housing and planning Act 2016.

25. The Tribunal takes the following into account:-
a) the fact that there was no evidence that the Respondent had any previous convictions
b) the conduct of the Respondent. In this respect the Tribunal finds that there was no deliberate attempt on the part of the Respondent to avoid applying for a licence for the property. It placed the task of obtaining the licence into the hands of its managing agents and could reasonably have expected them to do what was necessary to obtain the licence either before the deadline or very shortly thereafter. The managing agents' failures, however, are the Respondent's failures also. The Tribunal accepts that these were administrative failures rather than an attempt to evade the objectives of the Housing Act 2004 and when eventually granted, there were no onerous conditions attached.

26. The Tribunal was unable to assess the financial position of the Respondent because no details of its finances were disclosed. It is known, however, that the Respondent is an off-shore company based in Mauritius operating through a trust. Rampton Basely, we were told, has (quite rightly in the Tribunal's opinion) agreed to indemnify the Respondent in respect of the penalty imposed. Curiously, therefore, Ms Kleopa proceeded to submit that the penalty should be lowered as this would affect Rampton Baseley adversely. They would have to bear the licence fee of £560 as well as the Rent Repayment Order. The

Applicants' response to the Respondent's case referred to a copy of Rampton Baseley's filed accounts for 2017 and 2018. Those accounts show the company to be in a reasonably healthy financial position.

27. At the hearing the Tribunal expressed its concern that as any Rent Repayment Order made would be enforceable by the Applicants as a debt this would be difficult, if not impossible, against an off-shore company. The Tribunal has noted, however, that Rampton Basely have acknowledged to the Tribunal that they will indemnify the Respondent. The Tribunal expects them to honour that indemnity in settling direct with the Applicants the Order made below. If they fail to do so, no doubt the Applicants will take the matter up with ARLA, of which organisation Rampton Basely profess to be members.

The Tribunal's decision on the amount of the Order

28, Taking all matters into account and in particular the Tribunal's finding that there was not a deliberate attempt on the part of the Respondent to avoid registration the Tribunal considers that the Respondent's failure to register was at the lower end of the spectrum of seriousness and has decided that a Rent Repayment Order of £514.50 is appropriate in this case and so orders. In addition the respondent shall refund Tribunal fees paid by the Applicants in the sum of £300 (i.e. £100 application fee and £200 hearing fee).

Dated 2 December 2019

Judge D. Agnew (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking