FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**AB/LON/00BB/HMF/2018/0044**
Property	**:**	**Ground floor flat 229 Katherine Road London E6 1BU**
Applicant	**:**	**Mohammed Shahed Miah and MST Sahela Akter Dina**
Representative	**:**	**Justice for Tenants**
Respondent	**:**	**SUL Associates Limited and Jahangir Hussain**
Representative	**:**	**In person**
Interested person	**:**	**-**
Type of application	**:**	**Application by Tenant for a rent repayment order under the Housing and Planning Act 2016**
Tribunal members	**:**	**Judge Professor Robert M Abbey** **Ms Sue Coughlin MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**25 March 2019**

DECISION

Decision of the tribunal

(1) The tribunal finds that a rent repayment order be made in the sum of £11,000.00, the tribunal being satisfied beyond reasonable doubt that the landlord has committed an offence pursuant to s.95 of the Housing Act 2004, namely that a person commits an offence if he is a

person having control of or managing a house which is required to be licensed under Part three of the 2004 Act but is not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwellings.

Reasons for the tribunal's decision

Introduction

1. The applicant made an application for a rent repayment order pursuant to the terms of s.41 of the Housing and Planning Act 2016 in respect of a property known as **Ground floor flat 229 Katherine Road London E6 1BU**.

2. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination.

3. The hearing of the application took place on Thursday 21st March 2019. Mr Miah was represented by Alasdair McClenahan from Justice for Tenants and Mr Hussain appeared for the respondent.

The law

4. Section 41 of the Housing and Planning Act 2016 allows tenants to apply to the tribunal for a rent repayment order. The Tribunal must be satisfied beyond reasonable doubt that the landlord has committed an offence described in Part three of the Act and in that regard section 95 of the 2004 Act states

> *95 Offences in relation to licensing of houses under this Part*
>
> *(1)A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.*

5. The offence relates to a selective licence of residential accommodation within a designated area

Background

6. This property is located within a designated licensing area for houses as defined by statute. The licensing area was in fact the whole of the London Borough of Newham. Being a self contained flat on the ground floor of 229 Katherine Road London E6 1BU the property would have required, when the tenancy was granted, a selective license being within the London Borough.

The Offence

7. There being a house as defined by statute, then a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part three of the Act but is not so licensed. In the respondent's bundle there was what purported to be an application for a licence. This was a handwritten licence for a licence of a house in multiple occupation (HMO) and appeared to be dated 30th January 2018. There were also copy emails from the respondent to the Council about the application. However, there were no emails of letters or any other communication from the Council to show that the application had been received. Indeed the applicant produced an email dated 10 October 2018 from Nadia Islam an Assistant Licensing Officer at the London Borough of Newham in which she states:-

> "*I can confirm that the landlord has no licence on the property 229 Katherine Road East Ham London E6 1BU and from the information you have provided the property requires a selective licence*".

8. This email was dated almost 9 months after the time the respondent said the licence application was made. Furthermore, at the hearing the respondent submitted additional evidence that included a written property licence fee receipt issued by Newham and dated 9 February 2019 acknowledging the respondent's payment of a cheque dated 30 January 2019, exactly one year after the purported application was said to have been made.

9. The Tribunal took time to carefully consider the evidence regarding the purported application but came to the inescapable conclusion that none had been received by the Council. Therefore, the Tribunal concluded that this was an unlicensed house. Accordingly the tribunal had no alternative other than to find that the respondent was guilty of the criminal offence contrary to s.95 of the Housing Act 2004.

The tribunal's determination

10. By a Tribunal Direction dated 14 March 2019, (due to non engagement with the Tribunal or the process), the respondent was given notice of the risk of being barred from taking any further part in these proceedings. This arose from the Respondent not complying with the Tribunal's Direction in paragraph 2(a) of the Tribunal's letter dated 12 February 2019. At the hearing late submissions were handed in by both parties but this was caused by the respondent not complying with previous Directions issued by the Tribunal. Indeed, the respondent sought to submit a trial bundle including new evidence at the time of the hearing. To ensure that no party was prejudiced the Tribunal allowed all the late submissions having satisfied itself that the applicant had had time to review this late evidence and was able to respond to it.

11. One very unsatisfactory aspect of the evidence before it was that there were no less than three different tenancy agreements produced. The first was dated 1 December 2017, the second dated 4 December 2017 and the third was dated 26 November 2018. The tribunal found this surfeit of agreements to be emblematic of the general approach to this letting. It all seemed contrived and confusing.

12. One additional issue arose out of these tenancy agreements. This was whether the rent was inclusive of outgoings or not. Did the tenant have to pay for gas electric and council tax or was this deemed to be part of the rent. The agreements were conflicting and contained contradictory provisions. The landlord alleged that there was an unpaid gas bill for £357.04 but at the hearing conceded that this bill might include gas consumption in other properties. Furthermore, there was an unpaid electric bill of £903.92 but at the hearing the landlord conceded that there was only one meter for the whole property of which the ground floor flat forms part. A council tax bill was also produced but there was some doubt as to whether it related to the flat in question as the property was described as 229a and the applicant asserted that this was the address of another flat in the building. The Tribunal also noted that the names and addresses of the addressees on the three bills were obscured. The respondent asserted that this was because the information was "confidential". The tribunal found the evidence from the respondent regarding the unpaid bills to be unsatisfactory.

13. There were also clear issues around the state and condition of the flat. The flat was clearly affected by damp. On 28 November 2018 Newham inspected the property and said it would serve an improvement notice because of hazards discovered at the flat. The Council identified a category 1 hazard being damp and mould growth; a second category 1 hazard being dangerous electrics where a socket was immediately adjacent to the kitchen sink. A number of socket outlets were located within walls that were badly affected by damp. There was also a category 2 hazard arising from a non-working inappropriate fire alarm system. On the 14 March 2019 the Council revoked the improvement notice following works carried out to the flat by the respondent.

14. Additionally the applicant alleged that there were problems with water ingress through the roof which contributed to the damp. Also the applicant alleged that there were blocked drains and drain flies infesting the flat. There was also said to be a blocked kitchen sink. The applicant also said that the rent deposit paid by him had not been placed in an account under the deposit protection scheme.

15. The amount of the rent repayment order was extracted from the amount of rent paid by the applicant during the period from 4 December 2017 to 15 November 2018 and where the applicant was able to prove payment by reference to copy bank statements produced to the Tribunal. The Tribunal noted that on 1 January 2018 Newham

introduced a designated area for additional HMO licences. The building in which the flat is located would have required such a fresh licence but no evidence of the existence of such a licence or a confirmed application for it was produced to the Tribunal.

16. Furthermore the tribunal was mindful of the guidance to be found in the case of *Parker v Waller and others* [2012] UKUT 301 (LC) as to what should the tribunal consider a reasonable order given the circumstances of the claim. Amongst other factors the tribunal should be mindful of the length of time that an offence was being committed and the culpability of the landlord is relevant; a professional landlord is expected to know better. (In that regard the Tribunal noted that the respondent confirmed he dealt with some fifteen properties in his business). Indeed there is no presumption of a starting point of a 100% refund being made. (In that case an award at 75% was considered reasonable). In *Fallon v Wilson and Others* [2014] UKUT 300 (LC) it was confirmed that the tribunal must take an overall view of the circumstances in determining what amount should be reasonable.

17. Consequently, the Tribunal concluded that a rent repayment order be made in the sum of £11,000.00, the tribunal being satisfied beyond reasonable doubt that the landlord has committed an offence pursuant to s.95 of the Housing Act 2004, namely that a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part three of the 2004 Act but is not so licensed.

18. Taking into account all this guidance and the circumstances of the claim, the condition of the flat and the potential barring of the respondent, the tribunal considered that for the above period a reasonable amount should be in the region of 90% of the amount involved. The amount claimed was £12,497.81. The tribunal was satisfied with the paper based evidence as to the rental payments. However, the Tribunal, amongst other matters, took into account the nature of the property and the conduct of the parties when considering what is reasonable. The tribunal calculated that approximately 90% of the sum claimed amounted to £11,000.00. It is this amount that the tribunal considers reasonable and is to be the amount of the rent repayment order. The respondent is also ordered to refund to the applicant the application fee of £100 and the hearing fee of £200. The rent repayment and the fees refunds are to be paid by the respondent to the applicant within 28 days of the date of this decision.

19. The applicant raised the question of costs pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Because of the late submission of evidence the applicant said that additional time was required to consider and respond to the respondent's late evidence. This was said to necessitate extra time namely 8 hours charged at £165 per hour for the type of legal

representative involved. The respondent was then able to respond to this costs claim and explained that the respondent's response was delayed by a member of staff being away from the office on maternity leave and that the paperwork was eventually submitted and that it would be wrong to have to pay costs as the documentation had been provided.

20. With regard to the Rule 13 costs the tribunal's powers to order a party to pay costs may only be exercised where a party has acted "unreasonably". Taking into account the guidance in that regard given by HH Judge Huskinson in *Halliard Property Company Limited v Belmont Hall & Elm Court RTM, City and Country Properties Limited v Brickman* LRX/130/2007, LRA/85/2008, (where he followed the definition of unreasonableness in Ridehalgh v Horsefield [1994] Ch 205 CA), the tribunal was satisfied that there had been unreasonable conduct as more particularly described below so as to prompt a possible order for costs.

21. The tribunal was also mindful of a recent decision in the case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander* [2016] UKUT 0290 (LC) which is a detailed survey and review of the question of costs in a case of this type. At paragraph 24 of the decision the Upper Tribunal could see no reason to depart from the views expressed in Ridehalgh. Therefore, following the views expressed in this recent case at a first stage the tribunal needs to be satisfied that there has been unreasonableness.

22. At a second stage it is essential for the tribunal to consider whether, in the light of any unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

23. In *Ridehalgh* it was said that ""Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently.

24. The *Willow Court* decision is of paramount importance in deciding what conduct might be unreasonable. The Tribunal has mentioned the approach of the Upper Tribunal in this decision but think it appropriate to quote the relevant section of the decision in full:-

"An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level….."Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"

25. It seems to the Tribunal that therefore the bar to unreasonableness is set quite high in that what amounts to unreasonableness must be quite significant and of serious consequence. This being so the Tribunal must now consider the conduct of the parties in this dispute given the nature of the judicial guidance outlined.

26. The Tribunal was of the view that the respondent had acted unreasonably. Papers had been served on the applicant but without vital exhibits, (that had been filed with the Tribunal), and other evidence had been filed and served very late. The Tribunal had been forced to warn of potential barring and had noted the failure of the respondent to comply with Directions issued by the Tribunal. Accordingly, in the light of the above the tribunal can find evidence to match the high bar of unreasonable conduct set out above. Therefore, the first stage of the costs process is satisfied. The Tribunal also consider that in the light of the unreasonable conduct of the respondents that there be a costs order against them. Therefore the respondent should be responsible for costs incurred by the applicant but limited to the work that arose from the late submission of evidence. The applicant seeks costs of £1320 being eight hours of extra work required just prior to the hearing. However, the Tribunal considered this sum to be excessive and considered that two hours work would be appropriate given the nature of the evidence and the response that it required. Therefore costs of £330 are considered fair and reasonable given the nature of the work required. The Tribunal therefore orders the respondent to pay the applicants costs of £330.00

Name: Judge Professor Robert M Abbey Date: 25 March 2019

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such 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 such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

95 Offences in relation to licensing of houses under this Part

(1)A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2)A person commits an offence if—

(a)he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b)he fails to comply with any condition of the licence.

(3)In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a)a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b)an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4)In proceedings against a person for an offence under subsection (1) or (2) 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 (1), or

(b)for failing to comply with the condition,

as the case may be.

s41 Housing and Planning Act 2016

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.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)

Rule 13

(**a**) S.I. 1998/3132

Orders for costs, reimbursement of fees and interest on costs

13.

—(1) The Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998(**a**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**b**) and the County Court (Interest on Judgment Debts) Order 1991(**c**) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.