



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

Case reference : LON/00BE/HMF/2023/0029

Property : Flat 1, 46 East Dulwich Road, London
SE22 9AX

Applicants : James Den Montillano

Representative : Mr Cameron Neilson, Justice for
Tenants
Ref: 17011

Respondents : (1) David Lewis
(2) Atice Mehmet
Turkoglu

Representative : (1) Mr Lewis
(2) N/A

Type of application : Application for a rent repayment order
by tenant
Sections 40, 41, 43 & 44 of the Housing and
Planning Act 2016

Tribunal members : Judge Tagliavini
Ms S Coughlin (Professional member)

Venue : 10 Alfred Place, London WC1E 7LR

Date of hearing : 14 November 2023
Date of decision : 15 November 2023

DECISION

Decisions of the Tribunal

- (1) The tribunal makes a rent repayment order in the sum of £1,775.08 to be paid by the first respondent (Mr David Lewis) to the applicant within 14 days of this Decision being sent by the tribunal to the parties.**
 - (2) The first respondent is to reimburse the applicant the sum of £300 in respect of the application and hearing fee paid to the tribunal. Such sum to be paid within 14 days of this decision having been sent to the parties by the tribunal.**
 - (3) The tribunal consents to the applicant's withdrawal of the application against the second respondent.**
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The application

1. In his application, the applicant stated that this application is being made under s.41 of the Housing and Planning Act 2016 for the offence of: Having control of, or managing, an unlicensed house, under Part 3 s.95(1) Housing Act 2004 which is an offence under s40(3) of the Housing and Planning Act 2016.
2. The Housing Act 2004 Part 3 s.95(1) states:
 - (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.
3. The Housing Act 2004 Part 3 s.85(1) states:
 - (1) Every Part 3 house must be licensed under this Part unless—
 - 3 (a) it is an HMO to which Part 2 applies (see section 55(2)), or
 - (b) a temporary exemption notice is in force in relation to it under section 86, or (c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.
4. The applicant asserted the rented property was situated within a selective licensing area as designated by the London Borough of Southwark. The selective licensing scheme came into force on 01 March 2022 and applies to wards included in Designation 1 and Designation 2 including the ward of Goose Green within Designation 2 in which the Property is situated.

3. The applicant asserted the first and or second respondent had the control or management of the property at 46 East Dulwich Road This comprised a building with a commercial unit on the ground floor and four residential units above. The applicant had an assured shorthold tenancy of a studio flat with kitchen area and ensuite bathroom, known as Flat 1F, 46 East Dulwich Road, London SE22 9AX ('the Property') and asserted this was required to be licensed with effect from 1 March 2022 under a licensing scheme introduced by the London Borough of Southwark. In the absence of a selective licence the first respondent had committed an offence pursuant to section 95(1) of the Housing Act 2004.
4. The applicant seeks a rent repayment order in the sum of £2,274.76 for the period 1 March to 13 May 2023.

Background

5. The applicant entered into a written assured tenancy agreement with the first respondent for the Property dated 13 May 2021 for a term of 12 months at a rent of £950 per month (inclusive of utilities) with effect from 14 May 2021. The second respondent is the registered owner of the said Property.

Litigation History

6. The tribunal gave directions in respect of this application dated 14 April 2023 and the final hearing was held by way of a remote video hearing on 14 November 2023.

The Law

7. The Selective Licensing Scheme introduced by the London Borough of Southwark (LBS) on 1 March 2022 requires a house (or part of a house) to have a selective license if no other licensing scheme applied. This designation of selective licensing included the subject Property, as section 99 of the Housing Act 2004 states:

In this Part—

- *“dwelling” means a building or part of a building occupied or intended to be occupied as a separate dwelling;*
- *“house” means a building or part of a building consisting of one or more dwellings;*

and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it).

8. The Housing Act 2004 Part 3 s.85(1) states:

(1) Every Part 3 house must be licensed under this Part unless—

(a) it is an HMO to which Part 2 applies (see section 55(2)), or

(b) a temporary exemption notice is in force in relation to it under section 86, or (c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

9. Section 95(1) of the Housing Act 2004 states:

(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.

10. Section 263 of the Housing Act 2004 states:

(1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.

11. In considering the amount of any RRO, the tribunal is required to have regard to section 40(3) of the Housing and Planning Act 2016 which states:

(3)The amount that the landlord may be required to repay in respect of a period must not exceed—

(a)the rent paid 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, and

(c)whether the landlord has at any time been convicted of an offence to which this Chapter applies.

The hearing & issues

12. At the hearing, the applicant was represented by Mr Cameron Nielson from Justice for Tenants and relied on a bundle of 140 electronic pages and a Response of 5 electronic pages. The first respondent appeared in person and relied on an unsigned statement of 2 pages. The second respondent did not appear and was not represented but relied upon an unsigned statement of 1 page. At the beginning of the hearing, Mr Nielson informed the tribunal the applicant wished to withdraw its claim against the second respondent. No objection was made to this application and the tribunal consented to this withdrawal.
13. The applicant drew the tribunal's attention to the selective licensing scheme introduced by the London Borough of Southwark (LBS) and submitted that the Property fell within the designated area and that the offence under s.95(1) of the 2004 Act did not require the applicant to be in occupation of the property in order to seek a RRO, as it was sufficient for the Property to have been 'let' to the applicant even if were not occupied by him after 9 May 2022.
14. The applicant relied upon the contents of his witness statements dated 17 March 2023 and 15 May 2023 as his evidence-in-chief. However, the first respondent stated he did not wish to ask any questions in cross-examination.
15. Mr Lewis told the tribunal that he had previously been the lessee of the whole building which comprised of a commercial property

on the ground floor with four residential units above. However, since about May 2022 he had no longer had an interest in the Property having 'lost the lease.' Mr Lewis stated he had not known about the licensing scheme and LBS had not informed him of this requirement, even though it had insisted upon him converting the four residential units into two and he had carried out this work while the applicant was in occupation.

16. Mr Lewis provided no documentary evidence to support his assertions, stating that he no longer had any in his possession. Mr Lewis also told the tribunal he did not wish to rely on any mitigating factors or upon his financial circumstances that might be used to reduce the amount of a RRO, if any. However, Mr Lewis stated that he had waived the applicant's last month's rent because of the disruption caused by the conversion works.

Reasons for the tribunal's decision#

17. The tribunal finds the applicant has proved beyond reasonable doubt the first respondent has committed the offence under section 95(1) of having the management or control of an unlicensed house that was required to be licensed but was not so licensed. The tribunal is satisfied the Property was required to be licensed under the London Borough of Southwark's Selective Licensing Scheme, which requires all residential that are let to occupiers that are not otherwise licensed, to have a selective licence with effect from 1 March 2022.
18. The tribunal finds the first respondent did not establish any defence of 'reasonable excuse' and finds the lack of any documentary evidence establishing his interaction with LBS did not assist Mr Lewis in supporting his assertion that 'LBS did not tell me.' The tribunal also finds the applicant paid and the first respondent received, all of the rent due throughout the period of the tenancy including the final month's rent. The Respondent claimed that he had not charged the Applicant for one month to recompense for the disruption he had experienced. The tribunal preferred the applicant's evidence on this point as it was supported by bank statements and the first respondent provided no evidence that he had returned any rent to the applicant.
19. The tribunal finds the applicant is required to be in occupation of the Property during the period for which a RRO is sought. The tribunal does not accept the submissions made by Mr Nielson that it is sufficient the Property was let to the applicant for an offence to be committed and finds the Selective Licensing Scheme introduced by LBS is intended to safeguard actual occupiers of the relevant properties.

20. In considering the amount of the RRO, the tribunal takes as its starting point the maximum amount it can order. As a period of the tenancy during which the offence was being committed did not start until 14 March 2022 and ended on 9 May 2022 when the applicant gave up occupation, this amounts to £1,775.08.
21. As the first respondent provided no evidence as to the utility payments included in the rent nor of his financial circumstances, the tribunal did not consider it appropriate to make any deduction for these items. Further, the tribunal considered the first respondent's conduct in carrying out substantial conversion works to the Property while the applicant was in occupation constituted harassment. The Respondent stated in his 2 page bundle that planning permission for the conversion down to 2 flats had been obtained on 4 November 2020. He was unable to explain why he let the flat out knowing that extensive works were going to be carried out. We accept the evidence of the Applicant about the living conditions in the extended flat while the work was being carried out and consider that these works should not have been carried out during the applicant's occupation.
22. The tribunal considers, that in all the circumstances no deductions from the amount sought by the applicant are either required or should be made in its discretion. Therefore, the tribunal makes an RRO in the sum of £1,775.08 for the period 14 March 2022 to 9 May 2022. The tribunal finds the payment made for the period 14 February was made for a period during which at the time it was made, no offence was being committed and therefore cannot be included in a rent repayment order. *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041.
23. The tribunal directs the first respondent is to reimburse the applicant with the sum of £300 representing the application and hearing fees paid by the applicant to the tribunal.
24. The sums of £1,775.08 and £300 are to be paid by the first respondent to the applicant within 14 days of this decision being sent to the parties.

Name: Judge Tagliavini

Date: 15 November 2023

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).