FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2023/0101.**
Property	**:**	**Flat 53 Hutchings Wharf, 1 Hutchings Street, London E14 8JY.**
Applicant	**:**	**(1) Feier Meng** **(2) Bingbing Wei** **(3) Yangqiandai Si.**
Representative	**:**	**In person**
Respondent	**:**	**Ms Tam Tran**
Representative	**:**	**Mr D Lonsdale of counsel**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms S Phillips MRICS**
Date and venue of Hearing	**:**	**5 October 2023** **10 Alfred Place**
Date of Decision	**:**	**29 January 2024**

DECISION

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Decision

(1) The Tribunal declines to make a rent repayment order.

The application

1. On 5 April 2023, 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 23 June 2023.

2. In accordance with the directions, we were provided with an Applicants' bundle of 85 pages, and a Respondent's bundle of 129 pages. Both parties submitted skeleton arguments.

The hearing

Introductory

3. The hearing took place remotely using the VHS platform.

4. Mr Wei represented himself and the other two Applicants. They were assisted by Ms Jaigirdar, a University of London housing adviser as a McKenzie Friend. Mr Lonsdale of counsel represented the Respondent.

5. The property is a three bedroom flat, with a sitting room, a shared kitchen and two bathrooms.

6. The period for which the RRO is claimed is from 25 October 2021 and 24 April 2022. The total sum paid in rent in respect of that period by the three applicants together was £18,460.

The alleged criminal offence: evidence of the scheme/location

7. 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.

8. It was apparent to the Tribunal on reading the papers that the Applicants had not provided the usual evidence that there was an operative additional licencing scheme in the borough concerned, Tower Hamlets, or that the property fell within the area of such a scheme. The

same point was made in the Respondent's skeleton argument, where Mr Lonsdale argued that it was the responsibility of the Applicants to prove to the requisite standard all the elements of a criminal offence, and that a failure to provide evidence of a scheme necessarily proved fatal to the application.

9. We considered the question as a preliminary issue at the start of the hearing.

10. Mr Lonsdale submitted that the statute requires us to find that a criminal offence has been committed, and that imported a requirement that we act as a criminal court would. The existence of an additional scheme was not something of which we could take judicial notice. He emphasised the importance of a public finding that the Respondent had committed a criminal offence, notwithstanding that it did not amount to a formal conviction. That the Applicants were unrepresented was not relevant – there was no difference in the standard of evidence required between represented and unrepresented Applicants. Our informality did not mean we could ignore fundamental principles of evidence, and we could not make a finding that someone had committed a crime without the calling of proper evidence. There was no such evidence before us.

11. Mr Lonsdale acknowledged that we had – as he had – no doubt checked the Tower Hamlets website to discern the true position as to scheme and location. That was not, however, evidence. It was merely our own research. He adverted to the prohibition on jury research (or indeed, research by a judge or magistrate) in the criminal courts.

12. Mr Lonsdale also submitted that the contingent fact that the members of this Tribunal happened to know about the licensing schemes in Tower Hamlets as a result of hearing other cases was not something that we were entitled to take into account. It would be no more legitimate than it would be for a judge to take into account an assessment of the credibility of a witness as a result of a previous trial in assessing his or her credibility anew in another unconnected matter. We were entitled to a degree of informality as to the reception of evidence, but we were not entitled to find a criminal offence proven to the criminal standard without evidence of an element of that offence.

13. Mr Wei said that they had sought to adhere to guidance in relation to the case. They considered that the information provided by the local authority about the lack of a licence was sufficient.

14. That information consisted of an email from a housing intelligence officer at Tower Hamlets, the substantive part of which read "With the address provided, I have carried out a search on system and no licence or application has been found." The email was a response to an email from Mr Wei headed "Additional HMO License Check", giving the

property address and stating that the tenants were three students from different households. The email asserts that the flat is subject to the additional scheme.

15. We asked Mr Lonsdale for his view on the sufficiency of the evidence from the council. He said that to infer from this exchange that the property was in the additional licensing area was a stretch too far. The response simply confirms that there was no licence or application found. It was neutral as to whether the property was in the scheme area. An inference of what *probably* was meant is not enough – we must be sure, and could not be on the basis of this exchange. In coming to the conclusion that we are sure, we should exclude from our consideration the fact that we had done internet research.

16. We concluded that rather than adjourn to come to a conclusion on this issue, we should hear all of the evidence at the hearing, and notify our conclusion in due course.

17. Our conclusions are as follows.

18. We are satisfied beyond a reasonable doubt that the property was in an additional licensing area within Tower Hamlets on the basis of the email exchange provided by the Applicants.

19. The fact of the officer making any check at all, given the information as to the occupation of the property in the enquiry email from the Applicants, is sufficient for us to infer that there was a relevant licensing scheme in the borough.

20. We infer that the relevant scheme was not a selective scheme (the only other conceivable candidate), because if that had been the case, the officer would inevitably have corrected the Applicants. We note that if the property had been in a selective scheme, the criminal offence alleged would technically have been incorrect, but the same consequences would have flowed from a breach of the correct offence, that under section 95 of the 2004 Act.

21. Further, while we have no specific details of what "system" the officer consulted, we consider it wholly implausible that a London borough's systems would be such that a housing intelligence officer would be presented only with the information that no licence had been issued or applied for in respect of a particular address, without the essential concomitant that it was an address which required a licence.

22. So, although slight, the evidence that we did have was, properly analysed, sufficient for us to conclude to the criminal standard that there was an obligation for the property to be licensed under an additional licensing scheme, and that it was not so licensed.

23. In addition, if we are right in our view indicated below that the Tribunal is entitled to come to conclusions on this issue on the evidence as a whole, not just the Applicants' evidence, the Respondent's evidence supports this conclusion.

24. In her witness statement, the Respondent quotes exchanges with the managing agent in relation to licensing, which we quote when considering reasonable excuse below. Those exchanges demonstrate that the managing agent believed that a license was necessary, made enquiries as to whether one was in place, and found that it was not. It is also evident from the description given to the Respondent by the managing agent of the reason why a licence was necessary that the relevant licensing scheme was an additional scheme, not a selective one. Further, it was the Respondent's evidence that she did subsequently acquire a licence.

25. We did put to Mr Lonsdale a number of points for his response. Given our conclusion on the exchange with the licensing intelligence officer above, those are no longer strictly relevant, but in courtesy to him, we set out some conclusions or observations on those below.

26. We agree with Mr Lonsdale's argument that it is impossible to find a criminal offence has been committed without being satisfied to the criminal standard that every element of the offence has been made out. We do not agree that the statutory requirement that we find a criminal offence was committed is such as to import criminal standards or procedures, other than the statutory requirement to make the finding as to the commission of the offence on the criminal standard. Mr Lonsdale did not make this claim – we all understand that the Tribunal is not obliged to adhere to the criminal law of evidence, for instance. The same is true of procedural rules. The Applicants are not the Crown Prosecution Service, and the rules on, for instance, criminal disclosure are not relevant to these proceedings. We are not bound by the Criminal Procedure Rules. Mr Lonsdale agreed.

27. But we think, on consideration, that differences of procedure are relevant to the sort of submission Mr Lonsdale was making in relation to this element of the offence.

28. One of the differences between our procedure and that in a criminal court is that we do not have a procedure for the Respondent to make a defendant's submission of no case to answer following the closing of a prosecution case. The appropriate point for the Tribunal (unlike a criminal court) to make its assessment of the sufficiency of the Applicants' case on each element of the offence is after we has heard all of the evidence put forward (in the mode appropriate to Tribunal proceedings), rather than as either a preliminary matter or at "half-time", in the criminal sense. This consideration leads us to observe that

we were mistaken in considering the issue as a preliminary matter, although doing so in the event made no difference in this case.

29. We add the observation that we would not think it right that an application to strike out could be used as a substitute for a submission of no case to answer, whether before, at the commencement of, or during the course of proceedings on an application for an RRO.

30. We agree with Mr Lonsdale's argument that we should not take account of actual knowledge of licensing matters in a particular London borough that the members of the Tribunal had acquired from other cases. To do so, as he argued, would be to introduce a random element into the Tribunal's decision making according to the accident of the previous cases the members of the Tribunal happened to have heard (and see *Jarvis v DPP* [1996] RTR 192).

31. We are not persuaded by Mr Lonsdale's parallel between the evils of jury members undertaking internet "research", about which all juries are now strictly warned, and Tribunal members consulting official local authority websites in relation to declarations of schemes and the location of properties.

32. The relevant subject matter involved in the two cases (or, in the case of jurors, potential subject matter) is very different. The declaration of additional and selective schemes under the 2004 Act are in one sense matters of law. They are regulatory schemes governed by an Act of Parliament and by subordinate legislation, subject to formal procedures. One might say at a theoretical level that they are subject to rules of recognition. Applicants in person in RRO cases may easily assume that they count as "the law", and that therefore they do not need to prove them, any more than they must "prove" an Act or (at least nowadays) an SI. That is not, however, sufficient to exclude the schemes from the requirement of proof, on general principles. Local bylaws, for instance, which share many of the characteristics of the licensing schemes, require proof, albeit that statute now provides for a rebuttable presumption of validity on production of a printed copy (Local Government Act 1972, section 238).

33. The schemes must, rather, be proved by evidence, *as if* they were ordinary facts (for, in general, obvious and sensible reasons). The means by which they are proved in Tribunal proceedings, in the experience of the Tribunal, is by exhibiting the relevant notices, which is done by exhibiting screen shots of websites. Since the notices often proceed by references to properties in wards, they are usually accompanied by evidence of the location of the property in a particular ward, again by means of screenshots of website pages. Although it is not something we have seen, it does not seem inappropriate for such proof to be made by reference to URLs, rather than screenshots, in which

case it is difficult to see what the objection to the Tribunal accessing those URLs would be.

34. This is, first, a very long way away from the danger of the use of the internet by inexpert, possibly credulous, individual jurors to "research" (real) factual issues that then cannot be addressed by the parties, with all the well-known dangers of reliance on un-curated, inaccurate or malicious websites.

35. Secondly, if it be allowed, the expertise of Tribunal members would be relevant to consulting (in this region) London area local authority websites. It would be appropriate to repose confidence in the members of the Tribunal to properly interpret the official websites of London boroughs.

36. Had we not felt able to be sure of the relevant matters on the evidence in this case, we *might* (had we decided to run the risk of lèse majesté) have proposed that the existence of the schemes, at least in limited circumstances, should be recognised as matters capable of judicial notice after inquiry (for a discussion of this category of judicial notice, see Roderick Munday, *Cross and Tapper on Evidence* (13th ed, 2018), pp 79 to 81)).

37. On this basis, it could be recognised (either as falling within that category, or as a free standing exception to the general rule) that a Tribunal could take notice of the existence and extent of additional and selective licensing schemes where the Tribunal had satisfied itself by examination of the relevant website, and invited submissions on the website material from the parties at the hearing. *If* we had made such a proposal, it could be seen as being in the context of the ability of Tribunal proceedings to be adapted in ways beyond that possible in the courts (cf, for instance, the development by other First-tier Tribunals of procedures allowing facts found in one case to be relied on in another).

38. However, given our conclusions in this case, we do not make any such proposal. In any event, we think the consideration above in relation to the absence of submissions of no case is likely to do most of the work necessary.

39. Accordingly, we find that the primary elements of the offence are made out. No objection was made that the Applicants may not have used the property as their only or principal home. The evidence was that they were all overseas students studying in London, and, until they moved out, they clearly lived there the whole time. We infer that, beyond a reasonable doubt, they did occupy the property as their only or principal home.

The alleged criminal offence: reasonable excuse

40. Mr Lonsdale submitted that the Respondent had a reasonable excuse for failing to license the property.

41. Ms Tran was now living in Australia. The flat had previously been her family home, and was the only property she let, or had had experience of letting. She contracted a managing agent, Dockleys, to undertake full management of the property. She had had 20 years' experience of Dockleys, as, it appears, estate agents rather than managing agents of rented properties. Dockley's went into liquidation in October 2022, and thereafter it appears that the agreement was taken over by David Lee.

42. The management contract contained a term that "should the tenancy fall under the HMO regulations, you will be required to license the property ...". Mr Lonsdale submitted that this is in the conditional, and would only apply if an HMO license was necessary.

43. Mr Lonsdale relied on a series of WhatsApp messages from well after the relevant period reproduced by the Respondent between Ms Tran the managing agents. At Dockleys, she dealt with Emma Woods. At David Lee, she dealt with Adam Dockley. We reproduce the exchanges below:

> *9 September 2022*
>
> Adam Dockley: "And Emma asked me for your mortgage details as we need to renew your HMO licence please"
> Ms Tran: "What's an HMO license?"
> Adam Dockley: "It's so you can have more than two people living in the house with separate family names.
> We have a license with the local authority"
>
> *5 January 2023*
>
> Adam Dockley "They also claim there wasn't a HMO license but I believe that was applied for but it was during covid so council weren't processing things.
> Obviously I'll do everything I can to help"
>
> *6 January 2023*
>
> Adam Dockley: "Deposit I believe is in the DPS and license Emma woods applied for so she told me so I'll get on the register today "
> Ms Tran: "Thank you Adam"
> Adam Dockley: "I can't see a license in the register so will have to do an application for it!! Can't believe this but will get it sorted for you.
> Leave it with me
> They are not transferable so we will have to apply as David Lee in any case"

> Ms Tran: "May I ask how the previous tenant knew that we did not have an HMO certificate? You thought Emma had applied and she never told me that we needed this".
> Adam Dockley: "I have no idea…guess they checked the register or their representative did?
> So she told you when these guys moved in that shed applied for it previously or was applying then?"
> Ms Tran: "She was silent about this. I was only made aware of the need for an HMO certificate when the current tenant moved in and in the telephone conversation I had with you when you reached out to me about it. You both told me that we needed one because there were three guys with different surnames"
> Ms Tran: "Adam, you told me that you had started the HMO application and had asked me for all the information that you needed. Are you saying now that it hasn't been done? Did Emma get the update gas certificate?"
> Adam: "Yes we have the GSC now but no we have been looking into the HMO we need to do this asap and I think it's better to get someone that knows what they are doing to make sure it's all done correctly rather than me try…not my forte"

44. Mr Lonsdale submitted that on 9 September, Mr Dockley was referring to the need to "renew" an HMO licence, clearly implying that they had already acquired one. When she asks what the licence is, he asserts that they have a license. This, Mr Lonsdale argues, shows that the company is accepting that it was its responsibility to secure a licence. On 6 January, the transcripts appear to show that "Emma" had lied to her superior, Mr Dockley, in saying that she had applied for a licence.

45. We should take into account that Mrs Tran's personal circumstances, in relation to which she had given evidence – she was living abroad in Australia, she was pregnant, and suffering from complications thereto, and her husband had been diagnosed with a very serious disease.

46. Mr Lonsdale applied the approach set out in *Aytan v Moore* [2022] UKUT 27 (LC), [2022] HLR 29 at paragraph [40] to the facts of this case.

47. That paragraph reads

> … a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements

> without relying upon an agent, for example because the landlord lived abroad.

48. As to the requirement for a contractual obligation, Mr Lonsdale submitted that the WhatsApp extracts showed that the managing agents had clearly not informed the Respondent of the need for a license, and indeed had themselves taken responsibility for procuring a license, and had failed to do so. Ms Tran had had 20 years professional engagement with Mr Dockley, and had been satisfied with Dockleys performance over that time, which satisfied the criterion that a landlord should have good reason to rely on the agent. Finally, the Respondent was living abroad, the very example of a good reason for a landlord not to have informed themselves given in *Aytan v Moore* itself.

49. Mr Lonsdale submitted that the reasonable excuse defence is fact sensitive, and these factors, taken together, should be sufficient to discharge the Respondent's burden, on the balance of probabilities, of making out the defence.

50. In his closing submissions, Mr Wei said that the system had been in place two years before the Applicants rented the property. Even if she had passed the responsibility for licensing to the agent, she should nonetheless have undertaken checks on the property, and to ensured that the relevant regulations were being complied with.

51. We prefer Mr Lonsdale's submissions, and agree that the *Aytan v Moore* criteria are made out.

52. As to the agent's contractual responsibility, in her evidence, Ms Tran, in addition to the paragraph referred to in paragraph 42 above, referred to a shortly following paragraph which read

> If you opt for the service including Property Management [which Ms Tran had] Dockleys will
> (a) Deal with the day to day management of the property and be the main point of contact for the tenant
> (b) Arrange any certificates that are required for the property such as gas safety certificate or EPC.

53. Ms Tran says in her witness statement that she thought that the two provisions together were such that she was entitled to assume that Dockleys would tell her if she needed an HMO licence.

54. That they did not do so is evident in the WhatsApp exchanges. But those exchanges, as Mr Lonsdale submits, also show that the managing agents *own* interpretation of their obligations went further than that, to the extent that they considered themselves bound to provide a licence. That is a striking demonstration of the nature of the relationship between the contracting parties as it worked in practice. We consider

that this amply demonstrates that the contractual relationship criterion is satisfied.

55. We agree with Mr Lonsdale's submissions as to the other two criteria. In respect of the last, one might think that the deleterious effects of living abroad might nowadays be somewhat mitigated by the existence of the internet, but it is indeed the one example given in *Aytan v Moore*. We would also put some emphasis on the difficult personal circumstances of the Respondent taken in the round.

56. We accordingly find that the defence is made out and the Respondent is not guilty of the criminal offence alleged. We dismiss the application.

Rights of appeal

57. 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.

58. 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.

59. 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.

60. 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:** 29 January 2024

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.

	Act	*section*	*general description of offence*
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

	Act	*section*	*general description of offence*
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.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
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.