FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AK/HMG/2023/0024 & 0028**
Property	**:**	**55 The Sunny Road, Enfield, Middlesex, EN3 5EF**
Applicants	**:**	**Mehmet Emin Yalcin and Munevver Gulum Yalcin (First Applicants) London Borough of Enfield (Second Applicants)**
Representative	**:**	**Mr Cameron Neilson, Justice for Tenants**
Respondent	**:**	**Ms Beatrice Addae-Anderson**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Tribunal Judge H Lumby** **Ms R Kershaw BSC**
Date of Hearing	**:**	**10th December 2023**
Date of Decision	**:**	**25 January 2024**

DECISION

Decisions of the tribunal

(1) The tribunal dismisses the Applicants' applications for rent repayment orders.

(2) The tribunal dismisses the Applicants' applications for reimbursement of fees.

Introduction

1. The Applicants have applied for rent repayment orders against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**"). The First Applicants are applying in their capacity as tenants and the Second Applicants are applying in their capacity as payers of the housing element of Universal Credit in relation to the First Applicants' rent.

2. The basis for the application is that the Respondent was controlling and/or managing a house which was required under Part 3 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicant but was not so licensed and that she was therefore committing an offence under section 95(1) of the 2004 Act.

3. The Applicants' claims are both for repayment of rent paid during the period from 1st September 2021 to 10 July 2022. The First Applicants are claiming £5,034.48 and the Second Applicants are seeking £11,315.52. The Applicants are seeking 85% of the maximum award.

4. The tribunal was provided with an Applicants' Statement of Case, running to 306 pages, a Respondent's bundle containing an additional 127 pages and a response to the Respondent's bundle comprising of an additional 18 pages. The contents of all these documents were noted by the tribunal.

5. The hearing was attended by the First Applicants, together with Ms Arzu Sahan, a Turkish speaking interpreter appointed by the tribunal. The Applicants were represented by Mr Neilson. The Respondent appeared in person and was supported by her daughter Mrs Amma McKenzie and her son in law Mr Joel Wayne Binnie McKenzie as observers. Three additional persons were present as observers.

Applicants' case

6. The Applicants contend that the First Applicants occupied part of the Property between 27 September 2020 and 10 July 2022 pursuant to a tenancy agreement dated 11 September 2020.

7. The First Applicants occupied the part of the house comprising a downstairs living room, toilet and kitchen and an upstairs bathroom and two bedrooms. They lived there with their two children. The Respondent also lived in the Property which had a communal entrance giving access to both parts of the Property.

8. In August 2021 the Respondent began building works in the Property, including removing partitioning between the First Applicants' part of the Property and the part occupied by the Respondent. The works took approximately four months.

9. The Property is within the London Borough of Enfield. The Council runs a selective licence scheme which requires all privately rented residential accommodation within the designated area to be licenced unless it is subject to statutory exemptions. One of these exemptions is shared accommodation. The scheme came into effect in the area in which the Property was located on 1 September 2021. The Applicants contend that the Respondent should have obtained a licence but never did. The commencement of the selective licence scheme is the start date for their claims.

10. The First Applicants received housing benefit within their Universal Credit to help pay the rent paid to the Respondent. This was paid by the Second Applicants.

11. The Applicants' case is simply in relation to the purported breach of the selective licence and is not in relation to an unregulated house in multiple occupation.

12. The Applicants deny that the Property was shared accommodation and the First Applicants had exclusive occupation of their part of the Property. Their argument is that prior to the removal of the partitions, the Property physically worked as two separate dwellings, with the First Applicants having exclusive use of the kitchen, the bathroom, the sitting room and washing facilities. This continued in practice after the removal of the partitioning, with the Property operating functionally as two separate households. They argue that there was very little sharing of amenities and so the shared accommodation exemption did not arise even after the removal of the partitioning.

13. The Applicants also contend that the Respondent does not have a reasonable excuse for failing to obtain a licence. Any excuse or excuses would need individually or collectively to cover the whole period when there should have been a licence. They argue that she cannot claim

ignorance as she did not take reasonable steps to find out what her obligations were. They in addition argue that she cannot rely on the local authority to inform her about the scheme as they had no contractual or statutory obligation to do so. Finally she could not rely on her agents failing to tell her about the scheme. As a result, the Applicants argue that the Respondent could not rely on a reasonable excuse defence.

14. The Respondent gave the First Applicants one month's notice to quit and the tenancy ended on 10 July 2022. This is the end date for the claims.

15. The Applicants also argue that the Respondent has breached the Housing Health and Safety Rating System in three respects. First, by reason of excess cold, causing one of the First Applicants' children to require emergency hospital treatment; secondly, by failing to deal with rodents and finally failing to address blocks in the kitchen drain.

16. The Applicants have provided a copy of the tenancy agreement and evidence of rental payments. They submit that the Applicants are entitled to 85% amount of rent paid during the relevant period.

Respondent's case

17. The Respondent argues that the Property did not require a selective licence during the relevant period because it was shared accommodation. She argues for example that she had access to the bathroom but chose not to use it. Similarly she had access to the kitchen but similarly chose not to use it, in order to give the First Applicants privacy. There was only one utility room and one staircase, which she also used. The accommodation was shared but she chose to give them sole use of these areas.

18. She accepts that she was aware of the selective licence scheme but believed it did not apply to her due to the shared accommodation. As a result, she did not investigate further. She argues that this position was reinforced by the Council. At one point, she learned that the First Applicants had a separate registration for council tax, she contacted the Council on 23 November 2020 and explained that this was shared accommodation and she was responsible for the council tax. This was supported by a statement to the Council by the First Applicants confirming it was shared accommodation.

19. The partition had been a safety feature to protect her grandchildren from the utilities, once they grew up, it no longer served a purpose so she removed it.

20. Under section 95(4) of the 2004 Act, the Respondent will not have been guilty of an offence under section 95(1) if she can demonstrate she had a reasonable excuse for not having licensed the Property. She submits that

she did have a reasonable excuse. This is that she was not aware that the scheme applied to her and the Council should have taken greater steps to inform her that she required a licence. She argues that the Housing Act 2004 imposes a duty on local authorities to endeavour to ensure that the landlords caught by a scheme register for it and she produced a letter written to another landlord by the Council informing the recipient of the need to register; she received no such letter. She did not need a licence when the tenancy with the First Applicants was originally created and the Council would have known by her correspondence in relation to the council tax that she had people living in her house. Her first contact with the Council was a letter dated 10 October 2022, after the tenancy had ended. As a result, she had no knowledge throughout the relevant period of the requirement for a selective licence. If she had, she would have applied for the licence.

Follow-up points at hearing

21. In cross examination, the Respondent explained that she did not use bathroom and toilet upstairs to give the First Applicants privacy. She also left the main entrance to them and instead used a side door, only needing to cross into the part occupied by the First Applicants to get to the boiler and the ground floor shower room. She did no cooking in the kitchen, instead using a microwave and portable hob. There were two fridges in the Property, as the First Applicants had brought their own, so she removed hers from the kitchen.

22. Initially, there was an additional room on the first floor which was accessed by the main staircase. This was later included in the area for which the First Applicants were paying by way of increased rent. There was an additional spiral staircase being installed giving access to the first floor from the Respondent's part of the Property although this does not seem to have been completed.

23. The Applicants pointed to evidence in their statement of case that the Council had visited the Property on 17 June 2022 and met with Mrs Yalcin of the First Applicants. The officer visiting (Elvan Berker, a licensing inspection and enforcement officer) concluded that the Property is licensable under the selective licensing scheme. There is however no evidence of any letter being received by the Respondent as a result until the letter of 10 October 2022.

24. The Respondent had initially used managing agents to manage the tenancy arrangements but had terminated their retainer in December 2020 when she found out that the First Applicants were receiving housing benefit.

Relevant statutory provisions

25. Housing and Planning Act 2016

Section 40

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has 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 …

(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 by 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

7	This Act	section 21	breach of banning order

Section 41

(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.

Section 43

(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 has been convicted).

(2) A rent repayment order under this section may be made only on an application under 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with – (a) section 44 (where the application is made by a tenant) …

Section 44

(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 the 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 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.

Housing Act 2004

Section 95

(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 … but is not so licensed.

(4) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

Tribunal's analysis

26. The Respondent has accepted that the Property was not licensed at any point during the period of the claim. She also does not deny that she was the landlord for the purposes of the 2016 Act, nor that she was a "person having control" of the Property and/or a "person managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

27. The Respondent however denies that she was required to have a licence on the basis that it was shared accommodation. The tribunal has considered the written and oral evidence put forward by the parties and finds on balance that the Property was not shared accommodation. The First Applicants had sole use of a bathroom, living room and kitchen. The Respondent's position that the kitchen was shared but she chose not to use it is not accepted as sufficient. The practical effect of this was that the First Applicants had sole use of the kitchen with the Respondent having

separate facilities, comprising a microwave, hob and fridge. Likewise, there was no shared washing facilities, the First Applicants using the upstairs bathroom with the Respondent utilising the ground floor shower. The removal of the partitioning did not change the de facto position.

28. We are therefore satisfied based on the evidence before us that the Property required a licence under the local housing authority's selective licensing scheme from 1 September 2021 until the tenancy ended on 10 July 2022. We are also satisfied on the evidence that the Respondent had control of and/or was managing the Property throughout the relevant period and that the Respondent was "a landlord" during this period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

29. Under section 95(4) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 3 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

30. The Respondent submits that she did have a reasonable excuse in that she did not know that she had to have a licence and the London Borough of Enfield made no attempt to inform her that she should have a licence.

31. The Applicants have pointed to the case of *Marigold & Ors v Wells* [2023] UKUT 33 (LC), where the Upper Tribunal held that a person wishing to utilise a section 95(4) reasonable excuse defence must show that they had a reasonable excuse for the whole period in question. That period in this case is from 1 September 2021 to 10 July 2022.In addition, the Applicants have referred to the approval of the Upper Tribunal in that case of a test for assessing reasonable excuse, set out in the case of *Perrin v HMRC* [2018] UKUT 156 (TCC). That test comprises first setting out the facts asserted by the landlord that give rise to a reasonable excuse, secondly deciding which of the facts are proven and finally establishing objectively whether these facts amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased.

32. The facts relied upon by the Respondent are that at the time she entered into the tenancy with the First Applicants no licence scheme was in place; she was aware of a licence scheme being introduced but genuinely did not believe that this applied to her as she believed that she was sharing occupation; she had informed the Council that she had occupiers in the Property and was paying the council tax on the basis of a single shared occupation; the Council had an obligation to get affected residents to obtain licences and they failed to do so, first the Council did not inform her that she should apply for a licence when they did inform others,

secondly there was no correspondence from them to the Respondent until October 2022 (even though there was a visit by them in June 2022) and finally she was not made aware that the scheme applied to her.

33. The tribunal agrees that the licence scheme was not in place when the Respondent entered into the tenancy and accepts that the Respondent genuinely did not believe that the scheme applied to her because she believed she was sharing occupation. We also accept that she informed the Council in November 2020 that she was sharing occupation with the First Applicants for council tax purposes (we also note that this is the wrong department of the Council in relation to licensing). The tribunal finds, absent any evidence to the contrary, that she was not informed at any point during the relevant period by the Council that she required a licence, despite evidence being provided that others were informed and a licensing officer visited the Property in June 2022. No evidence has been provided showing how the Council did promote the scheme to those affected. Accordingly, the tribunal finds, on the balance of probabilities, that the first time she was made aware that she should have a licence was by the letter from the Council dated 10 October 2022, ie after the expiry of the relevant period.

34. The tribunal has in the past been reluctant to accept ignorance of the requirement for a licence as a reasonable excuse. The Applicants have drawn our attention in that regard to the case of *AA v Roddriguez & Ors* [2021] UKUT 0274 (LC), where the Upper Tribunal held that it will not usually constitute a reasonable excuse defence. By the same token, it accepted that it can succeed, based on a careful evaluation of the facts.

35. The Applicants have argued that the purported facts do not constitute an objectively reasonable excuse. They contend that there is no statutory obligation to notify the Respondent of the need to licence the Property, she failed to take reasonable steps to keep abreast of licensing obligations and the Council has not undertaken to inform the Respondent when a licence would be required (as was the case in *D'Costa v D'Andrea & Ors* [2021] UKUT 144 (LC), which has been relied upon by both parties).

36. The tribunal has considered these various facts and arguments as a whole.

37. We have taken into account the fact that the licence scheme came into existence after the tenancy was granted. The Respondent has stated that she was aware of the scheme and so we have considered whether she ought to have investigated the position, as suggested by the Applicants. We have noted that she is not a professional landlord and this is her only property. We accept that she genuinely believed that the scheme did not apply to her, because of her mistaken belief that she shared occupation with the First Applicants. The tribunal considers that, whilst mistaken, this view was not unreasonable. As such, we accept that she should not

have been expected to investigate further without some sort of external prompt.

38. The Applicants have argued that the Council was not under a statutory or contractual duty to inform the Respondent about the scheme. The tribunal accepts that there was no contractual duty. The Respondent has pointed to section 61(4) of the Housing Act 2004, which provides that

'the local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of HMOs in their area which are required to be licensed under this Part but are not'

39. Section 61(4) applies to HMOs not single properties within a selective licence scheme. However, the tribunal considers that the Council should nonetheless take reasonable steps to make affected persons aware of the need for a licence. We note that it did indeed do this in relation to a different property. No evidence has been provided that the Council made any approach to the Respondent until after the relevant period. Similarly, no evidence has been provided that the Council sought to make householders aware of the scheme and its implications. The Respondent has argued that she informed them of the shared occupation in November 2020 but this was to the council tax department. However, in June 2022, the Council had visited the Property and concluded that a licence was required. No evidence has been provided to suggest that this was acted upon until October 2022. Without any attempt to make contact until after the relevant period, the tribunal finds on an objective basis that until that date the Respondent was reasonable in holding her mistaken belief that the scheme did not apply to her.

40. Taking all of this into account, the tribunal finds, on the balance of probabilities, that the Respondent's mistaken belief constituted a reasonable excuse for her failure to have a licence. This reasonable excuse lasted until October 2022 and therefore covers the whole of the relevant period. We therefore find that the Respondent had a reasonable excuse for the purposes of section 95(4) of the 2004 Act.

<u>The offence</u>

41. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed house under section 95(1) of the 2004 Act is one of the offences listed in that table.

42. Having determined that the Respondent has a reasonable excuse for failing to license the Property, the tribunal does not have the power to

make a rent repayment order. As a result, the Applicants' applications are dismissed.

Cost applications

43. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.

44. As the Respondent has been successful in this claim, we are satisfied that it is not appropriate in the circumstances to order the Respondent to reimburse these fees and this application is dismissed.

Name: Judge H Lumby **Date:** 25 January 2024

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.