In the FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Tribunal Case reference	**:**	**LON/00AN/HMF/2024/0005**
Property	**:**	**173A New Kings Road, London SW6 4SW**
Applicant	**:**	**Jasmine Lennard**
Representative		**Jonathan Coad, solicitor**
Respondent	**:**	**Christopher Casey**
Representative		**Amy Kelly of counsel, instructed by Capsticks LLP**
Type of application	**:**	**Rent repayment order**
Tribunal Judge	**:**	**Judge Adrian Jack, Tribunal Member Appollo Fonka FCIEH**
Date of decision	**:**	**27th April 2024**

DECISION

Background

1. The applicant tenant held a series of assured shorthold tenancies commencing in 2022 over 173A New Kings Road in the London Borough of Hammersmith and Fulham. She says that the property was subject to a selective licensing scheme brought into force by the Borough on 5th June 2017, but that the respondent landlord did not have a selective licence until after he applied for one on 14th November 2023.

2. The tenant seeks a rent repayment order in the sum of £32,050 for the period 30th October 2022 to 30th October 2023. (In fact, this seems to claim one month's rent too much, but nothing turns on this.)

The law

3. Section 40 of the Housing and Planning Act 2016 gives this Tribunal the power to make a rent repayment order "where a landlord has committed an offence to which this Chapter applies." The only relevant offence is that in section 95(1) of the Housing Act 2004, which, so far as material, provides:

> "(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."

4. Under section 41 a tenant can apply for a rent repayment order in respect of housing let to him in breach of, inter alia, section 95(1). By section 43(1) this Tribunal may only make a rent repayment order if it is satisfied beyond reasonable doubt that a landlord has committed a relevant offence, here under section 95(1).

5. Because cases have to be proved to the criminal standard of proof, the burden is on the tenant to establish that an offence has been committed. The landlord has the right to silence. There is no provision for judgment by default. Where a tenant has established a *prima facie* case, it may be appropriate in some cases to draw an inference from the landlord's failure to adduce evidence, but this cannot reverse the burden of proof. As in contempt proceedings, "the burden of proof remains on the Claimant throughout, to the criminal standard, and the Claimant can invite the Court to conclude, on the basis of all the evidence in the case, that the Defendants [are in breach]. If the contemnor chooses to remain silent in the face of that dispute, the Court can draw an adverse inference against him, if the Court considers that to be appropriate and fair, and recalling that silence alone cannot prove guilt": *VIS Trading Co Ltd v Nazarov* [2015] EWHC 3327 (QB), [2016] 4 WLR 1 at [31], approved by the Court of Appeal in *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 at [91].

6. In order to establish a selective licensing scheme, the local authority has to follow the requirements of section 83(2) of the 2004 Act. The relevant delegated legislation is the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (SI 2006 No 373), which provides:

> "9(1) A local housing authority that is required under section 59(2) or 83(2) of the Act to publish a notice of a designation of an area for the purpose of Part 2 or 3 of the Act must do so in the manner prescribed by paragraph (2).
> (2) Within 7 days after the date on which the designation was confirmed or made the local housing authority must—
> (a) place the notice on a public notice board at one or more municipal buildings within the designated area, or if there are no such buildings within the designated area, at the closest of such buildings situated outside the designated area;
> (b) publish the notice on the authority's internet site; and
> (c) arrange for its publication in at least two local newspapers circulating in or around the designated area—
> (i) in the next edition of those newspapers; and
> (ii) five times in the editions of those newspapers following the edition in which it is first published, with the interval between each publication being no less than two weeks and no more than three weeks.
> (3) Within 2 weeks after the designation was confirmed or made the local housing authority must send a copy of the notice to—
> (a) any person who responded to the consultation conducted by it under section 56(3) or 80(9) of the Act;
> (b) any organisation which, to the reasonable knowledge of the authority—

(i) represents the interests of landlords or tenants within the designated area; or

(ii) represents managing agents, estate agents or letting agents within the designated area; and

(c) every organisation within the local housing authority area that the local housing authority knows or believes provides advice on landlord and tenant matters, including—

(i) law centres;

(ii) citizens' advice bureaux;

(iii) housing advice centres; and

(iv) homeless persons' units.

(4) In addition to the information referred to in section 59(2)(a), (b) and(c) or 83(2)(a), (b) and(c), the notice must contain the following information—

(a) a brief description of the designated area;

(b) the name, address, telephone number and e-mail address of—

(i) the local housing authority that made the designation;

(ii) the premises where the designation may be inspected; and

(iii) the premises where applications for licences and general advice may be obtained;

(c) a statement advising any landlord, person managing or tenant within the designated area to seek advice from the local housing authority on whether their property is affected by the designation; and

(d) a warning of the consequences of failing to licence a property that is required to be licensed, including the criminal sanctions."

7. In the current case the tenant has adduced no evidence that all of these requirements for the making of a selective licensing scheme were satisfied. (Whilst a breach of regulation 9(3) might not be fatal to the validity of a scheme, regulation 9(2)(a) and (c) is probably different. The public advertisement of the scheme is an important protection for landlords. Those not on the internet, as significant numbers may not have been in 2006, would otherwise have no means of learning of their obligation to obtain a licence.) The burden of proving the validity of the scheme was on the tenant, however, Ms Kelly for the landlord took no point on this. It was common ground that the scheme was on the local authority's website, so it may be that the maxim *omnia praesumuntur rite esse acta* applied (the presumption that all formalities have been observed). In the event we do not need to decide this point.

Was the flat in the area of selective licensing?

8. Instead Ms Kelly took a different point, namely that the tenant has not proved that the flat with which we are concerned was in the selective licensing area.

9. The tenant did not adduce evidence of the terms of the notice making the selective licensing scheme. The only evidence before us is a screenshot of an explanatory webpage written by the local authority. This says:

> "You will need a Selective Licence if you are a landlord of any house or flat you rent to a tenant or tenants in 24 specified streets in the borough. Selective Licensing is designed to improve conditions in parts of the borough where the levels of antisocial behaviour, rubbish nuisance and noise problems arising from rented accommodation were above average."

10. It then identified the specified streets, which included New Kings Road.

11. The flat at the relevant time had the address 173A New Kings Road. However, the flat was not in fact on the New Kings Road. It was on Quarrendon Street, a cross street. The only entry to the flat was through a door on Quarrendon Street. The landlord has recently changed the address of the flat to 2C Quarrendon Street, but this was after the times on which we need to adjudicate. (After the renaming of the address, the local authority refunded half the licensing fee he had paid.)

12. The tenant's case is that the address of the flat was conclusive as to whether the flat required selective licensing.

13. The local authority's view is expressed in an email of 17th February 2024 from Rikesh Shah MCIEH, the local authority's private sector housing team leader. He says:

> "The website is correct in that the designation applies to every house (or flat) in the area, the area being the 24 streets as listed on Annex A.
>
> Although our website does not state the house (or flat) has to be in one of the designated streets, the address of the property held by Royal Mail determines if a property is located on one [of] the 24 streets.
>
> As the addresses of the flats known as… Flat First Floor 173 New King's Road London SW6 4SW are on Quarrendon Street, the flats fall outside the designated licensing area, and we can confirm houses (or flats) on Quarrendon Street were never subject to Selective licensing."

14. Although the email is not entirely clear, it does support the tenant's case that the address of the flat is conclusive as to whether it requires selective licensing.

15. This, however, is not the end of the matter. Whether a flat which is not on a listed street requires selective licensing by virtue of its address is a matter of the true construction of the notice establishing the selective

licensing scheme. We have not seen the notice and are therefore unable to reach a view as to its true construction.

16. Whilst Mr Shah's view may be correct as to the requirements of the local authority's notice, he is not a lawyer and there is no evidence he has analysed the terms of the scheme as a lawyer would. He no doubt reflects the local authority's view on which properties fall within the selective licensing area. (And the local authority did grant a licence in respect of 173A New Kings Road after the landlord's application in November 2023.) However, the local authority's view is not conclusive. What matters is what the notice making the selective licensing area on its true construction actually requires.

17. In our judgment, there is a real doubt as to whether under the terms of the notice defining the selective licensing area a property which is not in fact in a listed street is properly subject to the licensing requirement solely by reason of its address being in a listed street. Accordingly, we are not sure that the flat did require a licence. There is a reasonable doubt about this.

18. It follows that the tenant has failed to prove to the criminal standard that her flat required licensing. Accordingly, we refuse to make a rent repayment order.

The defence of reasonable excuse

19. If we are wrong in our conclusion on the requirements of the local authority's selective licensing scheme, we turn to consider whether the landlord would have a defence that he had a reasonable excuse not to license the flat.

20. The landlord has a number of properties but is not in our judgment a professional landlord. However, he does not employ a managing agent. Instead, he uses the firm of Chatterton Rees to find tenants. Once that firm found tenants, he would manage the properties himself.

21. We heard evidence from Mr Edward Bezzant of Chatterton Rees. It appears that Chatterton Rees rent premises from the landlord. Mr Bezzant and the landlord enjoy a good relationship. However, it was no part of Chatterton Rees' duties to keep the landlord informed of general developments in the rental market, like the introduction of selective licensing.

22. We reject the submission on behalf of the landlord that he was entitled to rely on Chatterton Rees keeping him up-to-date on the local authority's requirements. That was not, we find as a fact, part of the duties of these agents.

23. The landlord did nothing to keep himself up-to-date with his obligations as a landlord. We accept that he was not a professional landlord, but even as a private landlord he needed to keep himself informed as to his

obligations. The landlord has in our judgment not proven on balance of probabilities that (if, contrary to our determination above, he did have a requirement to obtain a licence) he had a reasonable excuse not to obtain a licence.

The amount of any rent repayment order

24. We have considered whether we should determine the amount of any rent repayment order we would make, if we were wrong in our decision on liability. In our judgment it is not appropriate. The tenant has numerous complaints about the condition of the premises. These include an alleged infestation of rodents. The difficulty we have is that the tenant has a right to bring County Court proceedings in respect of these complaints. It would be wrong for us to carry out a mini-trial which would trespass on decisions which are for the County Court. By way of example, the landlord says that the problem with rodents was dealt with by him in a speedy and satisfactory manner, so that there was an eighteen month period without any issues regarding rodents.

25. If we were to make a decision about this, there might be difficult issues as to how far our decision gave rise to a *res judicata* (a judicially determined fact), binding on the parties in the County Court. Accordingly, we decline to make a determination of these facts on the hypothesis that the flat was within the area of selective licensing.

Costs

26. The Tribunal has a discretion as to who should pay the fees payable to the Tribunal, which in this case amount to £300, paid by the tenant. The tenant has lost. Costs usually follow the event. There is no sufficient reason in our judgment to depart from that starting point. Accordingly, we make no order for costs.

DECISION

(1) The applicant's application for a rent repayment order is refused.

(2) There be no order for costs in respect of the fees payable to the Tribunal.

Judge Adrian Jack **27th April 2024**