FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/HMJ/2024/0002.**
Property	**:**	**Flat LG05, The Beaux Arts Building, 10-18 Manor Gardens, London N7 6JT.**
Applicant	**:**	**Isobel Kai** **Charles Nock**
Representative	**:**	**In person (Mr Nock acted as spokesperson)**
Respondent	**:**	**Holaw 479 Limited**
Representative	**:**	**Mr Leoni of counsel**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mrs L Crane MCIEH**
Date and venue of Hearing	**:**	**13 September 2024** **10 Alfred Place**
Date of Decision	**:**	**12 November 2024**

DECISION

Orders

(1) The Tribunal makes a rent repayment order against the Respondent to the Applicants in the sum of £4,470, to be paid within 28 days:

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £320.

The application

1. On 3 March 2024, 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 25 April 2024, and amended on 29 May 2024 to identify the correct Respondent.

The hearing

Introductory

2. The Applicants represented themselves, Mr Nock acting as their spokesman. Mr Leoni of counsel represented the Respondent. Ms Lyons, of Tudorvale Properties, gave evidence for the Respondent.

3. The property is a one bedroom flat in the lower ground floor of the Beaux Arts Building, a large block of flats on Manor Gardens in Islington.

The alleged criminal offence

4. The Applicants allege that the Respondent was guilty of having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 95(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.

5. The Applicants case is that the property was situated within a selective licensing area as designated by the London Borough of Islington ("the Council").

6. For the respondent, Mr Leoni argued, first, that the selective scheme identified did not apply to the property. Secondly, he argued that if it

did, then the Respondent had a reasonable excuse which relieved it of liability (section 95(4)).

7. It is helpful at the outset to set out an agreed chronology in relation to the licensing scheme and the property.

8. A copy of the designation of the selective scheme by the Council was exhibited by the Respondent. Under the heading "area to which the designation applies", the following text appears:

> "The Council hereby designates for selective licencing under section 80 of the Act the area of the London Borough of Islington shown in Appendix A in relation to all privately rented properties of the description outlined in paragraph 5."

9. Appendix A shows an area highlighted, within which the property lies. It is coterminous with the then boundaries of the ward of Finsbury Park.

10. The designation goes on, in the next paragraph and under the heading "application of the designation" the following:

> "This designation applies to all houses and flats located within the Finsbury Park ward and rented to either
>
> o a single person
> o two people sharing
> o any number of persons forming a single household (family)"

11. The designation was made on 22 October 2020, and became effective on 1 February 2021.

12. Meanwhile the ward boundaries of the Council were reviewed, and on 5 May 2022, new boundaries became effective. In that reorganisation, a section of Finsbury Park ward bounded by Hornsey Road in the East, Seven Sisters Road in the South, Holloway Road in the West and Tollington Way in the North was moved into Tollington Ward. The property is located in that parcel of land.

13. The Applicants' tenancy lasted from 17 February 2023 to 17 February 2024.

14. Subsequently, a new designation of a selective area became effective (on 20 May 2024), which included all of both Finsbury Park and Tollington wards (and another ward further North).

15. Mr Nock argued that the property was in the area identified as the area of the selective licencing scheme, and fell within the relevant description.

16. Mr Leoni, for the Respondent, argued that as a matter of law the designation related to the ward of Finsbury Park. Since the property did not lie in Finsbury Park after May 2022, it was not subject to selective licensing.

17. The designation specifically referred to the ward of Finsbury Park. In construing the effect of the designation, we should have regard to the way that it was treated by the Council. Although designation is a formal step provided for in the Housing Act 2004, Mr Leoni argued that there was no specific provision as to how a designation should be made. He argued that a designation was not a statute, and that its proper understanding could and should be illuminated by other sources.

18. Mr Leoni referred us to references in the Council's website to the selective scheme as relating to Finsbury Park, and in particular to a report to the council proposing the extension of the selective scheme. As part of the background to the proposal, that report refers to the 2022 ward boundary changes and goes on

> "These changes have made the existing designation of the Finsbury Park scheme both contradictory to the new ward boundaries and confusing for all concerned."

19. Part of the rationale for the extension scheme was to address these issues.

20. Mr Leoni also relied on an exchange of emails between his instructing solicitors and a junior member of staff in the Council's licensing section, in which the member of staff appeared initially to agree that the designated area coincided with that of the post-boundary changes ward, and then contradicted themselves in a conspicuously badly expressed email.

21. We reject Mr Leoni's submission.

22. The question is one of law – did the selective scheme apply, as a matter of law, to the property, or not. It is not a matter of fact, and so the criminal burden of proof does not apply to it.

23. We consider that it is the passage under the heading "area to which the designation applies" that is the conclusive specification of the area, and that proceeds by reference to the map. The property is in the highlighted area of the map. It is that which the Council "hereby designates". The reference to the ward in the following paragraph is not there to specify the area, but as a way of introducing the description of the properties to which the scheme applies. No doubt the drafting is unfortunate, but we do not think that the reference to the ward name can possibly contradict the designated map, once the two ceased to coincide.

24. Indeed, we think that the reference in the officer's report supports this view, rather than Mr Leoni's submission. It is precisely because the designated area remained that specified in the map, and thus failed to coincide with the ward, that led to confusion, and created the "contradiction". If the designated area was ambulatory, in the sense that it changed when the ward boundary changed, there would be no conflict, such as to lead to uncertainty.

25. We do not think that the recent email exchanges referred to by Mr Leoni advances his case, either. While it may be unfortunate, we do not think that the confused and confusing exchanges with a junior member of staff can properly be relied on as an aid to the construction of an official document such as the designation.

26. We turn to reasonable excuse, to which Ms Lyons' evidence is relevant. In her main, first, witness statement, Ms Lyons related the principal facts, referred to the references to Finsbury Park as the area of the first selective licensing scheme, and said that throughout the term of the Applicants' tenancy, she relied on information provided on the Council's website to the effect that the property was in Tollington ward, and not subject to selective licensing.

27. In answer to questions from the Tribunal, Ms Lyons explained that the Respondent company was effectively run by her father, and existed to own the eight flats in the property (it now, we were told, controlled both the leasehold and the freehold titles). Her father had been involved in the original development of the block some thirty years ago. Tudorvale Properties was a developer of residential property, but was currently engaged in property management. She managed the eight properties through Tudorvale. She personally managed about 65 residential properties and eight commercial properties in London, located in Tower Hamlets, Waltham Forest, Camden, Islington, Chelsea and Westminster. She was, she said, aware of the licencing regimes in each of those boroughs.

28. As to this property, it was let on an assured shorthold tenancy before the Appellants' tenancy. She said she was aware of the HMO licensing schemes in Islington, and had had meetings with licensing officers in relation to two of the other flats in The Beaux Arts House, which operated as HMOs. Both were licenced.

29. Ms Lyons said she became aware of the selective licensing scheme as a result of these proceedings. She did have mechanisms in place to inform herself of landlords' legal responsibilities – she was registered with NARLA and another landlords' organisation the name of which she could not remember, and with, for instance, Islington's landlord forum. She had contacts in the Council who she had consulted on various matters. Since this application was made, she had emailed all of the other borough councils in whose areas she managed properties, as

she was unwilling to rely on the interactive maps each provided on their websites in the light of these proceedings.

30. Also relevant at this point is the evidence of the Applicants that they opened a letter addressed to "The Owner/Landlord" at the property. The letter, dated 4 October 2023, was from a licensing officer, and said that as a result of "intelligence", the Council believed that the property was subject to selective licensing. The Appellants did not pass the letter on to the Respondent. When it was put to Mr Nock by Mr Leoni that not doing so was a breach of a term in the tenancy agreement (clause 3.14, which obliged the tenant to promptly any "notice, order or legal proceedings" from, inter alia, any public authority), he agreed that it was. In hindsight, Mr Nock said, it was wrong of them not to have done so. It came, he said, at a tense time when the Applicants had contacted a London wide community company and a local renters' organisation for assistance in applying for an RRO, and were waiting for their advice.

31. Mr Leoni submitted that, even if the points he urged in relation to the proper interpretation of the designation were rejected, the same lack of precision and misleading statements on the Council's website were sufficient for us to find on the balance of probabilities that the Respondent had a reasonable excuse. The Respondent exhibited a screen shot from a web based service stating that the property's post code was in Tollington ward. The screen shot exhibited was dated 7 June 2024, but no doubt it would have returned the same result at any time after 5 May 2022.

32. He relied particularly on the Applicant's failure to pass on the letter of 4 October 2023. It constituted, he said, an attempt by the Council to inform the Respondent of the need for a selective licence that had been kept from them by the Applicants.

33. Mr Leoni took us to the guidance as to reasonable excuse in *Marigold v Wells* [2023] UKUT 33 (LC), in reliance on *Perrin v HMRC* [2018] UKUT 156 (TCC), at paragraph [48], and at paragraph [49] in respect of ignorance of a requirement of the law that was not well known, simple or straightforward. He also cited *Newell v Abbott and Okrojek* [2024] UKUT 181 (LC) at paragraph [15], in which the specific example of a selective licensing scheme is mentioned.

34. The problem with Mr Leoni's submissions is that Ms Lyons' evidence was that she was wholly unaware of the selective scheme until these proceedings. If she had been aware of the selective scheme, but had, despite reasonable diligence, been mislead as to the application of the scheme, it is possible that that would constitute a reasonable excuse. It is not clear to us why ignorance of the existence of the selective scheme in the first place could do so.

35. Ms Lyons is a professional property manager with a large portfolio of residential properties in London under management. She explained to us that she had taken appropriate steps to keep herself informed of the legal requirements on landlords and in particular in relation to licensing requirements. She was aware of and adhered to the HMO licencing requirements in Islington, including an additional HMO licencing scheme as well as the general mandatory licencing requirement. She told us she was aware of the schemes in place in other London boroughs. In terms of the three stage test set out in *Marigold*, at stage (1), she had no explanation as to why she did not know about the selective scheme. It is not a case where there was a particular fact that she sought to rely on as constituting a reasonable excuse. We do not think that, in those circumstances, it can be said that there is any explanation that can amount to an objectively reasonable excuse for the failure to licence the property. *Perrin* abjures us to consider the "experience and other relevant attributes" of the person concerned. Here, she had a great deal of experience of residential property management in general and of licencing obligations in particular.

36. We accept that the Applicants should have passed on the letter of 4 October 2023 to the Respondent. It is true that it was not strictly a "notice, order or legal proceedings", so there may not have technically been a breach of the tenancy agreement. It was, however, addressed to the "owner/landlord", and even if opened in error should have been passed on to the Respondent thereafter. However, a council is not obliged to inform every landlord in person of a licensing requirement, and the failure of an attempt to do so, even if wrongly intercepted, does not negative a landlord's obligation to understand its obligations and to adhere to them.

The amount of the RRO

37. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 20:

> "The following approach will ensure consistency with the authorities:
> (a) Ascertain the whole of the rent for the relevant period;
> (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. …
> (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made … and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:

> (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4)."

38. We add that at stage (d), it is also appropriate to consider any other of the circumstances of the case that the Tribunal considers relevant.

39. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

40. As to stage (a), by sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period. The parties agreed that the total rent for the relevant year was the correct starting point. It was undisputed that that was £22,800.

41. The Applicants paid for the utilities other than water supply. Water was supplied by the freeholder, and the cost charged in the service charge. Ms Lyons said that she thought the Applicants share would be about £1,000 to £1,200. The Applicants said that they currently paid £384 a year, in a comparable flat.

42. The Respondent's figure seems very high to us. We are abjured to use experience as a guide and come to what appears to us to be a reasonable figure in respect of utilities in the absence of specific evidence (see *Acheampong*). Doing the best we can, a figure of £450 feels more appropriate. At stage (b), the maximum is accordingly £22,350.

43. In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 95(1)]is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account (see *Ficcara v James* [2021] UKUT 38 (LC), paragraphs [32] and [50]: *Hallet v Parker* [2022] UKUT 239 (LC), paragraph [30]; *Daff v Gyalui* [2023] UKUT 134 (LC), paragraphs [48] to [49] and the discussion in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC), paragraphs [34] to [39]).

44. We turn to the seriousness of the offence committed by the Respondents compared to other licensing offences (ie those contrary to either 95(1) or section 72(1)).

45. We accept Mr Leoni's argument that the Respondent was not a rogue landlord. The Respondent, when aware of a licencing obligation, as with the flats that operated as HMOs, abided by their obligations. Similarly, when made aware of the selective licensing scheme, they promptly applied for a licence. The Applicants did not suggest that there was disrepair in the flat, that the fire safety precautions were not appropriate or that there was any other feature of the flat that would have required work before a condition of the licence would be met.

46. In assessing the quantum of the RROs at both stages (c) and (d), we have taken account of the guidance provided by the Upper Tribunal, including particularly where the Upper Tribunal has substituted percentage reductions in making a redetermination. The key cases are set out in (with respect) a most helpful manner in the course of the re-determination in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC) from paragraph [47] to [57]. We do not repeat that material here, but have been guided by it. The cases discussed range from 90% of the maximum to about 9%.

47. In *Newell*, the Deputy President sums up the effect of the various factors as illustrated in the cases under consideration in paragraph [57]:

> "Factors which have tended to result in higher penalties include that the offence was committed deliberately, or by a commercial landlord or an individual with a larger property portfolio, or where tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors tending to justify lower penalties include inadvertence on the part of a smaller landlord, property in good condition such that a licence would have been granted without additional work being required, and mitigating factors which go some way to explaining the offence, without excusing it, such as the failure of a letting agent to warn of the need for a licence, or personal incapacity due to poor health."

48. The Respondent is at least a substantial commercial landlord; and Ms Lyons an experienced property manager. However, in this case, unlike those in the list of cases considered by the Deputy President, we have found that the landlord was in general a responsible and compliant landlord. We have expressly found that it does not fall into the category of rogue landlords. The offence was committed as a matter of inadvertence (albeit not excusable inadvertence) on the part of the landlord.

49. The offence is therefore at the lower end of the spectrum of seriousness at stage (c). Although the facts are quite different, we consider that the overall sense of the seriousness of the offence is comparable to that in *Hallett*, and we adopt the starting point of 25% at this stage.

50. We move to consider the statutorily required factors of the conduct of the parties and the financial circumstances of the landlord (section 44(4) of the 2016 Act).

51. We do so mindful of the strictures in *Newell* at paragraph [61]:

> "… Tribunals should not feel that they are required to treat every such allegation with equal seriousness or make findings of fact on them all. The focus should be on conduct with serious or potentially serious consequences, in keeping with the objectives of the legislation. Conduct which, even if proven, would not be sufficiently serious to move the dial one way or the other, can be dealt with summarily and disposed of in a sentence or two."

52. The Applicants' main complaint related to major works undertaken in adjacent flats during the latter part of their tenancy. There had been extensive flooding in the area, as a result of which at least one flat was required to be vacated, and substantial remedial work undertaken. The Appellants complained of noisy and disruptive work undertaken during long hours during the relevant period.

53. There is no suggestion that the work was not necessary. Mr Nock mentioned at one point that better notice would have been helpful, but this complaint was not particularised. The work might also have been undertaken in more circumscribed times. There was no evidence of any complaints about either aspect. We do not think that undertaking necessary repairs to other properties can be regarded as poor conduct on the part of the Respondent.

54. We do not think there is any element of the conduct of the Respondent that, in the terms used in *Newell*, moves the dial one way or the other as to quantum.

55. We do think that the failure of the Applicants to forward the letter from the Council to the landlord is a significant factor, however. We have indicated at paragraph [36] above the view we take of this omission. Taking account of this element of the Applicants' conduct, we reduce the percentage to 20% at stage (d).

56. The Respondent has not sought to pray in aid its financial circumstances, and nothing in the proceedings alerts the Tribunal to take account of them independently of the Respondent's attitude.

Reimbursement of Tribunal fees

57. The Applicants applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. In the light of our findings, we allow that application.

Rights of appeal

58. 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.

59. 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.

60. 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.

61. 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:** 12 November 2024

Relevant legal materials

Free legal materials are available at the websites set out below.

Legislation

The legislation referred to in this decision may be consulted at:

https://www.legislation.gov.uk/ukpga/2004/34/contents

https://www.legislation.gov.uk/ukpga/2016/22/contents

Cases

Upper Tribunal cases, which are binding on this Tribunal, may be found using the search engine at:

https://landschamber.decisions.tribunals.gov.uk/Aspx/Default.aspx

Most other cases (including those referred to in Upper Tribunal decisions) may be found at https://www.bailii.org/