FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00/BE/HMF/2024/0064**
Property	**:**	**Flat 16 The Music Box 237 Union Street SE1 0LR**
Applicant	**:**	**Ms Nadine Niewstad Ms Sandra Wendell Ms Karen Zoontjens**
Representative	**:**	**Mr Jamie McGowan of Justice for Tenants**
Respondent	**:**	**Mr Christian Stewart Ms Wan Yee Wong aka Ms Deon Wong**
Representative	**:**	**n/a**
Type of application	**:**	**Application for a rent repayment order by tenant Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016.**
Tribunal	**:**	**Judge N O'Brien, Professional Member M Cairns**
Date of Decision	**:**	**26 November 2024**

DECISION

Decision of the Tribunal

(1) The Tribunal does not have jurisdiction to make a Rent Repayment Order in these proceedings.

(2) The application for a Rent Repayment Order is therefore dismissed.

Background

1. On 1 February 2024 the tribunal received an application under section 41 of the Housing and Planning Act 2016 (HPA 2016) from the Applicants for a rent repayment order (RRO). The Applicants assert that the Respondents, their former landlords, committed an offence of managing or operating a dwelling required to be licensed pursuant to s.61 of the Housing Act 2004 (HA 2004) but which was not so licensed. The Applicants' case is that the Respondents committed the offence from 1 March 2022 to 1 February 2023 inclusive and seek a Rent Repayment Order (RRO) for that period in the sum of £36,782, this being the 100% of the rent paid.

The Hearing

2. The matter was listed for a final hearing on 18 September 2024. The Applicants attended with their representative Mr McGowan of Justice for Tenants. Both Respondents attended in person. We considered the following documents;

   (i) The Applicants' bundle of 376 pages;
   (ii) The Respondents' bundle of 605 pages;
   (iii) The Applicants' response to the respondent and accompanying 632-page bundle;
   (iv) The Applicants' skeleton argument; and
   (v) The Respondents' skeleton argument.

3. We heard oral evidence from all three Applicants from both of the Respondents and their witness Mr Siddique-Parkes. At the start of the hearing we queried whether the application had been made within the 12-month period permitted by s.41 of the HPA 2016, given that the Respondents applied for a licence on 2 February 2023. We were informed by Mr McGowan that the Upper Tribunal was shortly due to consider 2 appeals in cases where the same issue had arisen. With the agreement of the parties we determined that we would reserve our decision until after the decision of the Upper Tribunal in the conjoined appeals of *Moh v Rimal Properties and Kiely v Bostall Estates Ltd [2024] UKUT 324*. We invited both parties to make written submissions following the determination of both appeals. We received written submissions from the Respondents. The Applicants did not make any further submissions.

Jurisdiction

4. Section 41(2) of the HPA 2016 provides:

> (2) A tenant may apply for a rent repayment order only if:
>
> ....(b) the offence was committed in the period of 12 months ending on the day on which the application was made

5. The jurisdictional point which arose in the above appeals is precisely the same as the point that has arisen in this one; does the day on which the application is made count toward the calculation of the 12 month period, and does the day on which the offence ceases count for the purposes of calculating the 12 month period.

6. In *Moh* the Upper Tribunal held that the words " *the period of 12 months ending on the day on which the application is made*" includes the day on which the application is sent to the Tribunal. Thus in this case the application sent to the Tribunal on 1 February 2024 will only have been made in time if the offence was being committed on 2 February 2023. However in *Moh* the Upper Tribunal also held that if the Respondent ceased to commit the offence on any given day by duly applying for a licence, that day does not count as a day on which an offence was being committed in its entirety.

7. The effect of *Moh* in this case is that the last day upon which the Applicants could have applied to the Tribunal for a Rent Repayment Order was 31 January 2024. The appeal was issued one day late.

8. Consequently this Tribunal is satisfied that it does not have jurisdiction to determine the application against the Respondents and the application must be dismissed. We have also considered the orders we would have made had we been satisfied that we had jurisdiction. This is for the benefit of the Upper Tribunal should there be an appeal in this matter.

Background

9. The property which is the subject of the application is a 3-bedroomed flat in a large purpose-built block situated in the London Borough of Southwark (LBS). On 1 March 2022 LBS introduced an additional licencing scheme for houses in multiple occupation (HMOs) which were not subject to mandatory licencing pursuant to the s.55 of the Housing Act 2005.

10. The following matters are not in dispute;
    (i) the property was required to be licenced under LBS's additional licencing scheme if at any time it was occupied by 3 or more persons who did not form one household;
    (ii) The First and Third Applicants resided in the property as their only or principal home from 3 October 2019 until 2 April 2023;
    (iii) Between 1 March 2022 and 4 May 2022 the First and Third Applicants were the only residents in the property;
    (iv) The Second Applicant resided in the property as her only or principal home from 5 May 2022 until 2 April 2023;
    (v) The Respondents' agent Mr Siddique Parkes submitted an online application for a licence to LBS on 2 February 2023 and from this date the Respondents have a defence the claim for a RRO by virtue of s72(4(b) of the 2004 Act; and
    (vi) The Respondents were managing and in control of the premises which were not licenced.

8. In the course of the hearing the Applicants accepted that no offence was committed between the date on which the additional licencing scheme came into force and 4 May 2023 when the flat was occupied by 2 persons only.

The Relevant Law

9. The power of local authorities to designate particular areas as being subject to an additional licencing regime is contained in sections 56 to 60 of the 2004 Act. By virtue of s.72(1) of the 2004 Act a person commits an offence if they are in control of or manage a HMO which is required to be licenced by virtue of Part 2 of the Act but is not so licenced. In proceedings against a person for an offence under s72(1) of the 2004 Act it is a defence that he had a reasonable excuse for having control of managing the house without the required licence; s72(5)(a) of the 2004 Act. It is also a defence in proceedings against a person for an offence under s72 (1) that the person had duly made an application for a licence at the material time.

10. Section 40 of the HPA 2016 provides;

(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, or…

(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.

10. Section 41 of the HPA 2016 provides

(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.

11. Section 43 of the HPA 2016 provides;

(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 section 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);

12. Section 44(2) of the 2016 Act provides that where the First-tier Tribunal decides to make a RRO under s.41(1) in favour of a tenant, the order may be made in relation to rent paid over the period not exceeding 12 months during which the landlord was committing the offence.

13. In *Marigold v Wells [2023] UKUT 33 (LC)* , the Upper Tribunal considered that the guidance on the defence of reasonable excuse provided by the Tax and Chancery Tribunal in the case of Perrin v HMRC was relevant to the issue of reasonable defence in the context of licencing offences:

> "*48. The Tribunal in* Perrin *concluded its decision with some helpful guidance to the FTT, much of which is equally applicable in the sphere of property management and licensing. At paragraph 81 it said this*:
>
> > "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> *49. The Tribunal then dealt with a particular point which is regularly encountered in HMO licensing cases and which therefore merits attention:*
>
> > "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and

> straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."
>
> *51. … When considering for how long any reasonable excuse persisted, it may find the systematic approach described in Perrin provides a helpful framework".*

14. In *Aytan v Moore [2022] UKUT 27 (LC),* the Upper Tribunal provided the following guidance on the scope of the "reasonable excuse" defence where the Respondent asserts he or she was misled by their agent (at para 40);

> *… 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.*

The Respondents' Defence

15. The Respondents resisted the application on the grounds they had a defence of reasonable excuse for the entirety of the relevant period. Additionally, they submit that they should deemed to have 'duly made' an application for a licence on 8 December 2022 and not on 2 February 2023 when their agent submitted the finalised application through LBS's on-line portal.

16. The Respondents live in Hong Kong. They have owned this property since 2016 and it has been rented for most of that time. In 2018 they appointed Circa as their letting agents under a 'full management' agreement. The have included a copy of their agreement with Circa in their bundle [46]. It was an express term of their agent's standard terms of business that responsibility for compliance with any regulations relating to HMOs would rest with the landlord and not with the agent.

17. On 20 October 2022, the Respondent's agent emailed the Respondents to inform them that their property required an additional licence under LBS's additional licencing scheme as their property had 3 tenants who formed more than 1 household. The agents offered their services in assisting the Respondents to submit the application for a licence for a fee of £720 plus VAT. On 22 October 2022 the Second Respondent messaged the Third Applicant via WhatsApp. In

her evidence she said this was to ascertain how many people were in the property. However we note that the WhatsApp message (at page 21 of the Respondent's bundle) she merely enquired how much the new tenant was paying for her room. The message suggests that she was aware that there were three unrelated persons residing in the property at that stage.

18. The Respondents received an email from LBS on 14 November 2022 advising them of the introduction of the additional licencing scheme The Respondents instructed Circa to apply for a licence on or about 20 November 2022. Mr Siddique Parkes started the application process on 8 December 2022. There was a short delay of 1 day as LBS's on-line application portal was not working on 8-9 December 2022. It took Mr Siddique Parkes some time to obtain the information necessary to submit the application. The application was ready for submission in January 2023 however it was not submitted at that stage because the agent intended to pay the application fee of £1300 from the rental payment which was due on 1 February 2023. On receipt of that rental payment Mr Siddique-Parkes submitted the application vial LBS's online portal, and paid the application fee, on 2 February 2023.

Findings of the Tribunal- Reasonable Excuse

19. The Applicants submit that the effect of *Altan* is that the fact that the management agreement placed all responsibility for HMO licencing on the client precludes the Respondent from successfully raising a defence of reasonable excuse. Reliance on an agent will only give rise to a defence of reasonable excuse in rare cases where it was reasonable for the Respondent to rely exclusively on the advice of the agent and there were real practical barriers preventing the Respondent from taking steps to independently acquaint himself or herself with the licencing requirements for the premises which he or she intended to let.

20. We consider that Respondents and their agent Mr Siddique Parkes gave largely truthful evidence of events leading up to the submission of the application for a licence, although we do not accept that the Respondents were not aware of the number of persons in the flat. We do not accept that the Respondents had a reasonable excuse either for not having a licence, or not submitting the application for a licence, prior to 2 February 2023. We accept that it might be more difficult for a landlord residing in Hong Kong to be sure that he or she is keeping abreast of his or her regulatory duties as a landlord, however we note that all the relevant information is available on-line. We accept that the respondent's in reality relied on Circa to inform them of their duties as landlord however as Mr McGowan pointed out in his submissions, the terms of business signed by the respondent and their agent expressly stated that it was the landlord's responsibility to ensure compliance with any HMO regulations. Furthermore at all material times the Respondents knew that this flat was being let as a 'flatshare' to unrelated tenants and was not let to a single household. In our view that should have alerted a reasonable landlord to the need to keep abreast of changes to regulatory requirements governing such lettings. It was clear that in this case neither Respondent had ever heard of the term 'HMO' prior to receiving the email from their agent in October 2022.

21. We are not satisfied that the Respondents had a reasonable excuse following their instruction to Circa to make the application on their behalf in late November 2022. There followed a delay of over 2 months while Mr Siddique–Parks was apparently gathering information for the application but we have no evidence to suggest that there was any particular piece of information necessary to submit a valid application which would not have been obtainable shortly after he was instructed. The application was not pursued with any great alacrity by either the Respondents or their agent, and we no evidence to suggest that there was good reason why it could not have been submitted earlier than it was. We note that there was an issue with LBS's portal but this was for a limited period of 24 hours.

Amount of RRO

22. In the case of Acheampong *v Roman [2022] UKUT 239 (LC)* the Upper Tribunal set out a 4-stage test which the tribunal must apply when considering how much to order a landlord to pay by way of an RRO. In summary the tribunal must;

    1. Ascertain the whole of the rent for the relevant period.

    2. Subtract any element of that sum that represents payment for utilities that only benefit the tenant. It is for the Landlord to supply evidence of these, but an experienced Tribunal will be able to make an informed estimate.

    3. Consider seriousness both compared to other types of offences for which an RRO can be made and examples of the same type of offence. What proportion of the rent (after deductions as above) is a fair reflection of the seriousness of the offence? This is the starting point. It is also the default penalty in the absence of any other factors but maybe higher or lower in light of the final step.

    4. Consider deductions or additions in light of section 44(4) factors (conduct of landlord and tenant, financial circumstances of landlord and any previous convictions of the landlord in relation to offences set out in section 40)

23. In *Kowalek v Hassanien Ltd [2022] EWCA Civ 1041; [2022] 1 W.L.R. 4558* the Court of Appeal held that when calculating the maximum recoverable under a rent repayment order, the rent in question had both to have been paid to discharge indebtedness which had arisen during the relevant period of offending by the landlord and in fact paid during that period. The effect of this

decision is that rent paid by the tenant at a time when no offence was being committed cannot be included in the calculation of the maximum amount of a rent repayment order even if it had been paid in order to satisfy a liability which accrued during the period when an offence was committed.

24. In the case of *Simpson House 3 Ltd v Osserman [2022] UKUT 164 (LC)* the Upper Tribunal considered that in deciding the level of any RRO, the tribunal should distinguish between the rogue landlord against whom a RRO should be made at the higher end of the scale and the landlord whose failure was to take sufficient steps to inform themselves of the regulatory requirements.

25. In ***Newell v Abbot*** **[2024] UKUT 181 (LC)** considered an appeal which has a number of similarities to the instant case. In that case the Upper Tribunal, having reviewed a number of recent authorities on the correct approach to quantification, observed at para 57;

> *"This brief review of recent decisions of this Tribunal in appeals involving licencing offences illustrates that the level of rent repayment orders varies widely depending on the circumstances of the case. Awards of up to 85% or 90% of the rent paid (net of services) are not unknown but are not the norm. 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 whether the tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors which tend to justify lower penalties include inadvertence on the part of the smaller landlord, property in good condition such that a licence would have been granted without one 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"*

26. In that case the Upper Tribunal noted that the landlord was not a professional landlord and that he had had committed the offence of controlling an unlicenced HMO through inadvertence rather than deliberately. The property was in reasonably good condition during the tenants' occupation. It made a RRO equating to 60% of the net rent paid.

27. The Applicants have compiled a schedule of payments in their bundle. The following payments were made between 5 May 2022 and 1 February 2023 relating to rent which was due in the same period;

- The first applicant paid a total of £12,909.60
- The second applicant paid a total of £7684

- The third applicant paid a total of £9555.07

28. None of the Applicants were in receipt of Universal Credit. No part of the rent they paid related to utilities.

29. While we bear in mind the important public policy reasons underpinning the HMO licencing regime, we consider that this is a less serious offence when compared to the other offences in respect of which a RRO can be made. These include controlling an unlicenced HMO, unlawful eviction and harassment. The Respondents cannot be described as rogue landlords. We bear in mind that the purpose of the legislation is deterrence; it is not relevant that the applicants have not suffered any personal loss as a result of the failure to obtain a licence.

30. We accept that for at nearly half of the relevant period the Respondents were taking steps to obtain the relevant licence. While we have not found that the Respondents had a reasonable excuse for not having licence we do consider that the matters that they relied on are highly relevant to the question of mitigation. We bear in mind that once the Respondents were alerted to the need for a licence they acted reasonably in instructing their agents to make the application on their behalf. We also consider that had they been alerted to the need for a licence either by their agent or by LBS it is likely that they would have acted sooner than they did. We bear in mind that would have been more difficult for the Respondents to stay abreast of regulatory changes as they were not living in the UK.

31. Save for a recurring issue with the front door, the property was in good condition throughout the applicant's period of occupation. All three Applicants accepted that the property was kept to a good standard. A particular problem however arose with the front door in that it could only be opened from the inside by twisting the thumb latch. The front door was the only way to exit the flat in an emergency. They raised a number of complaints about this over the years both with the Second Respondent and the agent. We accept that this was a recurring issue While the second respondent took some steps to resolve it the problem reoccurred on more than one occasion When asked why she did not leave it to her managing agent to carry out repairs she answered that the cost of carrying out small works of repair through the agent is always double the cost of engaging workmen herself. However it seems to us that the difficulty with trying to organise repairs from abroad is that one can never be sure that the work will be done to a satisfactory standard. In our view the Respondents should either have entrusted the work to the agent or instructed someone to replace the lock/latch on the door completely.

32. There were no relevant financial circumstances which the landlords wished to draw to our attention. They have no previous convictions.

33. Taking all of the above into account we consider that a starting point of a rent repayment order of 35% of the rent paid by each applicant during the relevant period (5 May 2022 to 1 February) would have been appropriate. However we

consider that the prolonged failure to take adequate steps to remedy the issue with the front door over a prolonged period is an aggravating factor and we would have increased this to 40%.

Name : Judge N O'Brien Date of Decision 26 November 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).