



Neutral Citation Number: [2024] UKUT 348 (LC)

Case No: LC-2024-554

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BK/HMF/2023/0196

8 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – application for an HMO licence – defence of reasonable excuse – failure to make findings of fact

BETWEEN:

MR FAH HOR CHONG

Appellant

-and-

ELEONORA SEVERGNINI (1)

ZSANETT ECSEDI (2)

HAE WON KIM (3)

Respondents

12 Arden Crescent,
London, E14 9WA

Upper Tribunal Judge Elizabeth Cooke
Decision on written representations

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Introduction

1. This is an appeal by Mr Chong, landlord of 12 Arden Crescent, London E14, against a rent repayment order made against him by the First-tier Tribunal in favour of the respondent tenants. Permission to appeal has been given by the Tribunal on the ground that the FTT did not consider the substance of the evidence he gave in support of his argument that he had a defence of reasonable excuse to the licensing offence relied upon by the tenants.
2. The appeal has been determined under the Tribunal's written representations procedure. Neither party has been legally represented.

The factual and legal background

3. 12 Arden Crescent is a four-bedroomed property in which the respondents rented rooms with shared facilities, having entered into individual occupation agreements with the appellant on different dates during 2022. While they were in occupation the property was a house in multiple occupation ("HMO") as defined by the Housing Act 2004. It did not require an HMO licence under the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. However, it fell within the additional licensing scheme operated by the London Borough of Tower Hamlets from 1 April 2019; that scheme covered properties occupied by:

"Three or more people living as 2 or more households They share facilities such as a bathroom or kitchen At least one of the tenants pays rent.

4. The property therefore required a licence throughout 2022 and 2023 while the respondents lived there. It is an offence under section 72(1) of the Housing Act 2004 to be in control of or manage an HMO that is required to be licensed and is not; section 72(4) and (5) makes available a number of defences to that offence, of which the relevant ones are as follows:

"(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—...

(b) an application for a licence had been duly made in respect of the house under section 63...

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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)..."

5. The offence under section 72(1) is one of those listed in section 40 of the Housing and Planning Act 2016, in respect of which the FTT may make a rent repayment order. The respondents applied to the FTT for such an order, each seeking repayment of the rent she had paid in respect of a period ending on 13 January 2023:

- a. Ms Severgnini claimed £10,529, from 2 February 2022 to 13 January 2023.

- b. Ms Ecsedi claimed £7,879 from May 2022 to 13 January 2023.
- c. Ms Hae Won Kim claimed £9,104 from 1 April 2022 to 13 January 2023.

The FTT's decision

- 6. Before the FTT the appellant did not dispute that the property required a licence under the additional licensing scheme while the respondents were in occupation. But he said he had a reasonable excuse. The FTT recorded his evidence as follows:

“7. The respondent asserted he had applied for an additional licence and his application had not been properly processed by the local authority. Specifically the respondent asserted he had created general profile on the LBTH website and had then gone on to complete an application for an additional licence for the subject property. However, because he wanted to be sure he had all the information the local authority might require before granting a licence and did not want to run the risk of forfeiting any fee he was required to pay before a decision was made on his application, he did not submit the application. The respondent told the tribunal he had expected to be able to return to the application but found it had ‘disappeared’ when he had gone back to it.

8. Subsequently, the respondent applied for an additional licence on 14/01/2023.”

- 7. The FTT found as follows:

“11. The tribunal finds the respondent did not submit an application for licence as he stated in his witness statement:

‘At some point around late June/July 2021, I contacted the council Environmental Health number and asked to speak to an Additional Licensing officer whom(sic) could go through the applications online with myself before I pay for them. I informed the officer that I was anxious with one particular condition under the terms and conditions found on the portal – It stipulated that the council could reject application and not refund any payment if any missing document is found to have been missed out from the application. I did not want to make avoidable mistakes on each of the 4 applications and wasting the fees.’

12. The tribunal finds the respondent chose not to run the risk of losing the licence application fee in case he was not granted a licence. The tribunal finds the respondent was at all times, aware of the steps required to make an application and is someone who by his own admission is computer and financially literate and was not misled either by the online application or by an unnamed local authority. The tribunal finds the respondent did not submit his application for an additional licence until 14/01/2023.

13. Therefore, the tribunal finds the respondent's defence of 'reasonable excuse' as not made out on the balance of probabilities. The applicants have proved, so the tribunal is sure the respondent has committed the offence of having the control and management of a property that was required to be licensed but was not so licensed."

8. The FTT then went on to consider the amount of the rent repayment order to be made in light of the provisions of the Housing and Planning Act 2016 and ordered the appellant to repay:

To Ms Severgnini: £5,264.50

To Ms Ecsedi: £3,939.50

To Ms Hae Won Kim: £4,552.00

together with £300 to reimburse them for the fees they had paid to the FTT.

The appeal

9. The difficulty with the FTT's decision is that although it recorded some of what the respondent said it failed to engage with the detail of his evidence. Indeed, on one point it misunderstood his evidence; the FTT at its paragraph 7, as we saw above, said that the applicant's evidence was that he "did not submit the application", but that is not what he said.
10. The appellant's evidence was lengthy; 11 pages of his witness statement before the FTT detail the steps he took to apply for licences for the property. His second paragraph summarised his position:

"I oppose the Rent Repayment Order (RRO) on the basis that I have made the appropriate applications in April-July 2021 on the council's portal, but due to miscommunication or misunderstanding made by the council, the applications that were on the portal that were supposed to be reviewed as I sought assistance from them, were not processed. Unfortunately, as a result of IT issues, there is no trace of these applications."

11. So his position was that he applied for a licence for this property and others during the period April to July 2021, before the periods for which the respondents sought rent repayment orders, and therefore had the defence provided by section 72(4) of the 2004 Act. His witness statement explained how he began the process of applying for an HMO licence for the property in April 2021, creating an online profile for the property and then pausing the process while some work was done. At some point in late June/early July 2021 he spoke to an officer in the local housing authority's environmental health department and explained that he wanted to go through the application with an officer before paying the fee, because he was uncertain about some of the requirements; he did

not want to pay, and then have the application rejected, and lose the fee. Paragraph 21 of his witness statement went through that conversation in detail:

“I told the officer that remediation works were almost complete and that I was ready to get my applications reviewed and paid for. It was at this point that the officer told me that there was a 9-12 months backlog on Additional HMO applications. The officer added that application can only be reviewed when an officer has been assigned to a case. I told the officer that I wanted my pending applications to be treated as valid applications and asked to be placed on the queue to be reviewed. The officer took down the address of either 12 Arden Crescent or 10 Grosvenor Wharf Road along with my email address and told me that she would pass the details to the Additional HMO team whom would get in touch with me. She commented that the team is likely to prioritise the paid applications and she did not know when I would be contacted by the team. I asked the officer how my applications would be treated as in terms of compliance with the Additional Licensing scheme whilst waiting for applications to be reviewed. **The officer told me that the council would backdate the applications to the date they receive the information.** Hence, my understanding was that I just had to wait for the council to get in touch when they are ready for inspection. The officer reminded me to keep and ensure that all the compliance and insurance certificates were valid and in-force continuously, failing which could result in rejection. I confirmed my understanding and ended the call. Up until this point, I took down careful notes and have ensured that I renewed all the compliance certificates on the anniversary dates. Although the council staff sounded hectic, I had no reason to doubt them because I have been using the phone helpline to seek advice from the council since 2011. However, at no point during this call was I informed that the Additional Licensing team would not review unpaid applications at all!”

12. According to that paragraph, what he thought he was doing as a result of what the officer told him was making an application and postponing the payment of the fee until it had been reviewed. The emphasis is added to highlight the information given by the officer, according to the appellant, which would appear to be what made him think that.
13. The appellant’s witness statement went on to explain that from October 2021 until December 2022 he and his family had some serious health problems, and it was not until January 2023 that he chased up the HMO licence applications for 12 Arden Crescent and other properties, and was told they had been deleted.
14. The appellant says that the local housing authority was not entitled to delete his data and that the deletion was a data loss that should have been reported to the Office of the Information Commissioner. In his grounds of appeal he has reproduced the information now given on the local application website, which warns applicants that unpaid-for application forms will automatically be deleted after 90 days, and which he says was not displayed on the website when he accessed it.
15. Pausing there, the FTT’s summary of the applicant’s evidence at its paragraph 7, with the inverted commas around the word “disappeared”, seems to express some scepticism about his evidence that his application was deleted. But no express finding of fact was made

about what the applicant said had happened to his application forms; if the FTT did not believe that the material he filed had been deleted it needed to explain why.

16. The FTT found that the appellant did not make an application for an HMO licence, in other words that the steps he took in June or July 2021 did not amount to an application for a licence. It did not explain that finding, which may or may not be correct but needs explanation because it is at odds with what the local housing authority's officer told the appellant – if that evidence is true, and the FTT made no finding about the truth of that evidence.
17. Furthermore, the FTT rejected the appellant's evidence that he believed he had made an application, but it did not say why – again, the FTT needed to consider and make a finding of fact about what he said the officer told him. If it did not believe his account of that conversation, it needed to say why. If it did believe him (and there is nothing inherently implausible about the appellant's account), then the FTT should have given consideration to whether he had a defence of reasonable excuse or, if not, whether there was nevertheless mitigation that could have an effect upon the amount ordered to be repaid.
18. As the Tribunal put it in the grant of permission to appeal, the FTT failed to consider the substance of the applicant's submissions about the defence of reasonable excuse and failed to make findings of fact about his conversation with the officer of the London Borough of Tower Hamlets. The FTT failed to take into account relevant evidence and failed to explain its conclusion; its decision is set aside.

Conclusion

19. The appeal succeeds, and the matter is remitted to the FTT for redetermination by a different panel.

Upper Tribunal Judge Elizabeth Cooke

8 November 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.