

UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Numbers: LC-2021-475

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING - RENT REPAYMENT ORDER - selective licensing under Part III of the Housing Act 2004 - defence of reasonable excuse - amount of the award

BETWEEN:

1) MRS KATHLEEN VICTORIA CHOW

(2) MR KA LOK CHOW

Appellants

-and-

(1) MR NATHAN SKIPPER

(2) MS JEMMA EVETT

Respondents

Flat 54, Elgin House, 235 High Road,

Chadwell Heath, Romford, Essex, RM6 6GN

Judge Elizabeth Cooke and Judge Siobhan McGrath

Royal Courts of Justice

6 January 2022

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Introduction

1.

This is Mr and Mrs Chow's appeal from a decision of the First-tier Tribunal ("the FTT") to make a rent repayment order against them in favour of the respondent tenants, Mr Skipper and Ms Evett.

2.

We heard the appeal by remote video platform on 6 January 2022. Mrs Chow represented herself and Mr Chow; the respondents chose not to participate in the appeal, although Mr Skipper attended the hearing.

The factual and legal background

3.

Mr and Mrs Chow own the freehold of Flat 54, Elgin House, which has been rented out for some years. It was let to Mr Skipper and Ms Evett on an assured shorthold tenancy on 25 March 2019. The property and letting arrangements were managed for the landlords by Advance Glenisters.

4.

It is not in dispute that the property is in an area designated as an area of selective licensing under Part III of the Housing Act 2004, and was required to be licensed under section 85 of that Act. Section 95 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.

(4) In proceedings against a person for an offence under subsection (1) or (2) 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), ...”

5.

That offence is one of those listed in section 40 of the Housing and Planning Act 2016, so that one of the consequences of the commission of the offence is that the tenants may apply to the FTT for a rent repayment order (“an RRO”) and recover the rent they paid while the property was unlicensed, up to a maximum of a maximum of twelve months’ rent.

6.

Mr and Mrs Chow held a licence for the property which expired at the end of August 2019.

7.

In July 2020 Mr Skipper opened mail addressed to the landlords at the property, and found that it was a final reminder that a licence was required for the property, from the local housing authority (Barking and Dagenham). Mr Skipper contacted Glenisters, and it was established that the landlords had not renewed the licence after August 2019. Mrs Chow applied for a licence on 16 July 2020. Subsequently the tenants applied for a rent repayment order, initially against Glenisters but the landlords were, correctly, substituted as respondents by the FTT prior to the hearing of the application.

8.

Mrs Chow’s evidence to the FTT, as summarised in its decision, was that she was made aware by Glenisters in July 2019 that she needed to renew the licence, and tried to do so but found that the local housing authority’s web page was not working. She wrote to the authority on 11 July 2019 asking for renewal paperwork, and was told by email on that date that a new on-line system was being set up and that she would receive an update within 3 weeks. She heard nothing more from the local authority.

9.

The local housing authority sent three reminders to Mr and Mrs Chow in June and July 2020, but posted them to the property itself, which is not where Mr and Mrs Chow live. When Mr Skipper opened the third letter, dated 6 July 2020, and contacted the agents, Mrs Chow – who was in Hong Kong at the time – was made aware of the situation and applied for a licence on 16 July 2020.

10.

The FTT recorded at paragraph 25 of its decision:

'The First Respondent's case was that she had difficulties completing the application because she could not use the portal and that thereafter "life got in the way".'

11.

It went on to say at paragraph 27 that it had seen an email from Glenisters dated 3 September 2019 asking Mrs Chow if she had renewed the licence and that she had replied "We have. Paid last night". The FTT therefore said that it was "not satisfied that this was entirely a case of mere inadvertence", and took the view that Mr and Mrs Chow, despite being well aware that a licence was required, took no steps to renew it for nearly a year. The FTT made a rent repayment order in the sum of £11,012, being the whole of the rent paid for the 319 days during which the offence was being committed.

Mr and Mrs Chow's appeal

The grounds of appeal

12. Permission to appeal was granted by this Tribunal on two grounds; first, on the ground that the FTT appeared to have taken the view that it did not have discretion to award less than the maximum amount of the rent, and second on the basis that the FTT might have based its decision on an incomplete understanding of the facts.

13. We take that second ground first.

14. In her grounds of appeal, and then at the hearing of the appeal, Mrs Chow explained what happened after the local housing authority told her, on 11 July 2019, that a new system was being implemented and that they should receive an update in three weeks. They heard nothing, but they kept logging on to the system to see if they could renew the licence. On 3 September they were able to do so and, as they thought, they did. Hence their response to Glenisters' enquiry in September 2019.

15. However, Mrs Chow also owns another property, 1 Morden Road, Romford, which she inherited from her mother in 2015. Her mother had been quadriplegic and so the house was adapted for wheelchair access etc, and therefore the house is let to the local housing authority who in turn use it to house people with disabilities. Mr and Mrs Chow are not required to have an HMO licence for it. Nevertheless, the housing authority's licensing portal lists both properties, and beside both properties is a "renew" button. When Mrs Chow clicked "renew" she clicked on the wrong property. She received a receipt for the payment and a licence, but did not notice that they related to 1 Morden Road.

16. Therefore, when Glenisters contacted Mrs Chow in July 2020 to say that the property was not licensed, she was unconcerned and assured them that it was. Then she looked at the licence itself and realised that it was for 1 Morden Road. She contacted the housing authority to ask if this was their mistake or hers, and was told it was hers, whereupon she applied on 16 July 2020 for a licence for 54 Elgin Road, and paid a fresh fee because she was told the fee paid in September 2019 was not transferable. The licence for Flat 54 was granted. Mrs Chow asked for a refund for the licence fee paid on 1 Morden Road, which was eventually repaid to her as recently as November 2021 (long after the FTT hearing).

17. At the appeal hearing we asked Mrs Chow whether she had explained this to the FTT. She said she did not make a witness statement in the FTT proceedings but that she thought she had explained the situation at the hearing, although she said she felt she could have explained more clearly. We asked if she had produced to the FTT the receipt for the licence fee that she paid on 3 September 2019; she said she believed she did but was not certain. She did say that she had sent a copy to the

agents, Glenisters. What of course she could not have produced was evidence of the refund for the unnecessary licence for 1 Morden Road, dated 19 November 2021, which we have in the appeal bundle and which is an important confirmation of what she says.

The merits of the appeal

18. A rent repayment order in the sum of £11,012 is on any reckoning a harsh penalty for clicking the wrong button

19. The FTT appears not to have been aware of the account Mrs Chow now gives, and could not have been aware of the refund of the payment made in September 2020 because it was not refunded until long after the FTT hearing. If Mrs Chow did give the same explanation to the FTT as she did on appeal, then we would have expected it to have been addressed in its decision. In the absence of any information from the tenants as to what was said at the FTT hearing we take the view that Mrs Chow did give the same explanation to the FTT but that, as she accepts herself, it may not have been as clear as it might have been and we consider that the Tribunal either did not see the receipt from September 2019 or did not understand its significance. Obviously, the FTT could not have seen the refund payment made in 2021.

20. Had the FTT seen the local housing authority's letter of 19 November 2021 stating that the licence fee paid on 3 September 2019 was being refunded it must have taken a different view of the facts. It would have seen that a licence fee had been paid for 1 Morden Road, and that the payment was being refunded because it was unnecessary. It would have understood that when Mrs Chow told Glenisters in September 2019 that the licence fee had been paid she was telling the truth and that she believed the licence had been renewed.

21. Should that crucial piece of evidence be admitted on appeal? Undoubtedly yes. We bear in mind the criteria in *Ladd v Marshall* [1954] 3 All ER 745, where Denning LJ, as he then was, said that there were three conditions to be fulfilled for fresh evidence to be admitted:

“first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case. Although it need not be decisive; the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible”.

22. This evidence could not have been obtained for use at the hearing before the FTT because it did not then exist. It would certainly have had an important influence on the result of the case, because it would have both clarified and confirmed Mrs Chow's evidence. And it is entirely credible because we have no reason to believe it is anything other than genuine.

23. We are anxious, of course, not to do injustice to the tenants in admitting this evidence. It would have been most helpful to us if they had participated in the appeal. They were invited by the Tribunal to make written representations in response to the application for permission to appeal, and submitted only a short email making no mention of the explanation given by Mrs Chow about what had happened, nor of the evidence of repayment, saying simply that they believed that the FTT decision had been correct and that landlords are in a privileged position and should comply with their obligations. Once permission was granted they chose not to participate in the appeal. If Mrs Chow's explanation was news to them, or if they had any reason to doubt the genuineness of the evidence of repayment, they have had ample opportunity to say so.

24. Accordingly we admit the fresh evidence, namely the local housing authority's email of 19 November 2021. As a result, it is clear that the FTT when it made its decision did so under a misapprehension as to a fact that was not only relevant but crucial. We set aside the decision in its entirety: not merely the decision as to the amount of the rent repayment order but also the decision that the offence had been committed, even though that decision was taken on the basis of Mr and Mrs Chow's admission.

25. We do so because we take the view that although Mr and Mrs Chow were indeed in control of an unlicensed property from 1 September 2019 to 16 July 2020, the facts as we now understand them indicate that they had a defence of reasonable excuse to the offence under section 95 of the 2004 Act. They took every possible step to renew the licence, they contacted the local housing authority when its website was inactive, they were promised information but received none, and they (as they thought) renewed the licence and (certainly) paid the licence fee as soon as the local housing authority made it possible for them to do so. The website was unhelpful because it allowed renewal of a licence for a house that did not require one. The local housing authority took no steps to notify Mr and Mrs Chow of their error but issued a licence and retained the fee in respect of a house that did not need a licence, and retained that fee for 26 months (for 16 of which it was holding two fees, having required a fresh payment for the appeal property in July 2020).

26. Mr and Mrs Chow are not lawyers and have been unrepresented throughout these proceedings. They admitted the offence because they did not understand the significance of section 95(5) of the Housing Act 2004, and for the same reason did not appeal the finding that they had committed the offence. But had the FTT been aware of what had actually happened, as confirmed by the fresh evidence given on appeal, it would not have accepted that admission and would have given consideration to whether the landlords had the defence of reasonable excuse. In the absence of consideration of the relevant facts by the FTT the decision to accept the admission was flawed. Mr and Mrs Chow have not formally asked in their grounds of appeal, for that decision to be set aside but would have done so had they been represented, and the factual grounds they have presented provide ample reason to set it aside; it would be wrong for the Tribunal not to do so on a technical basis arising from the drafting of grounds by people who are not lawyers.

27. That is why we set aside the FTT's decision in its entirety.

28. There is therefore no reason to give consideration to the first ground of appeal, which was that the FTT erred in making an order in the maximum possible sum. Had it been necessary to consider that ground we would have made reference to the decision of the Tribunal (The Hon. Sir Timothy Fancourt, President) in *Williams v Parmar* [2021] UKUT 244 (LC); that decision makes it clear that even on the basis of the facts that the FTT found in this case it could have awarded less than the maximum amount by way of rent repayment. But we do not need to explore that, because it is clear that the FTT arrived at its decision about the facts as a result of a misunderstanding which is resolved by the admission of fresh evidence."

Conclusion on the appeal, and re-determination by the Tribunal

29. The appeal succeeds and the FTT's decision is set aside in its entirety. The relevant evidence is before the Tribunal and it is able to substitute its own decision rather than remitting the matter to the FTT. We find that, for the reasons set out in paragraph 25 above, Mr and Mrs Chow had the defence of reasonable excuse provided by section 95(5) of the 2004 Act and therefore did not commit the offence under section 95(1). There is therefore no question of making a rent repayment order.

Judge Elizabeth Cooke Judge Siobhan McGrath

Dated 10 January 2022

Right of appeal

Any party to this case 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.