



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	:	CHI/43UM/HSE/2019/0004
<b>Property</b>	:	3 Winston Lodge, 12a Commercial Way, Woking Surrey GU21 6ET ("the property")
<b>Applicant</b>	:	Woking Borough Council
<b>Representative</b>	:	Amanda Cooper – Housing Standards Department Shaun Moss
<b>Respondents</b>	:	Mr Richard Gardner
<b>Representative</b>	:	None
<b>Type of Application</b>	:	Application for a rent repayment order by tenant  Sections 40, 41, 42, 43 & 45 of the Housing and Planning Act 2016
<b>Tribunal Members</b>	:	Judge Lederman P D Turner Powell FRICS Tat Wong
<b>Date and Venue of Hearing</b>	:	Havant Hearing Centre 13 February 2020
<b>Date of Decision</b>	:	16 March 2020
<b>Amended Decision</b>	:	27 <sup>th</sup> April 2020

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AMENDED DECISION Pursuant to Order of 27 04 2020

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## **The Application**

1. On 16 November 2019 the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“the 2016 Act”) from the Applicant for a rent repayment order (a “RRO”) in the sum of £4,553.79 housing benefit paid by the Applicant to the tenant of 3 Winston Lodge, 12a Commercial Way, Woking Surrey GU21 6ET (“the property”) between the period 1 April 2018 and 24 March 2019.
2. The Applicant alleges the Respondent has committed an offence of privately renting property without a selective licence for the period 1 April 2018 to 24 March 2019.
3. On 15 October 2019 the Applicant sent a Notice of Intended Proceedings (“the NIP”) to the Respondent. The Respondent made representations by letter of 18<sup>th</sup> November 2019 outside the 28 day period provided in the NIP.

## **Procedural directions and hearing bundle**

4. The Tribunal issued directions on 27<sup>th</sup> November 2019 requiring service of witness statements and bundles. The Applicant failed to comply with the directions about service of hearing bundles. On 31<sup>st</sup> January 2020 the Tribunal issued a direction stating that unless the Applicant did by 12 noon on 7<sup>th</sup> February 2020 “send” the hearing bundles in accordance with paragraphs 6 and 7 of the 27<sup>th</sup> November directions, the application would be struck out. The Tribunal received the bundles from the Applicant with its letter dated 5 February 2020. The Tribunal received an application dated 10 February 2020 from the Respondent seeking an order striking out the application, on the ground that he did not believe he could receive a fair hearing and attaching reasons for opposing the application. The matter was been referred to a procedural judge who advised that the hearing set for 13 February 2020 should proceed and the Respondent should if he wished to do so, raise his concerns at the hearing.
5. The hearing bundles sent by the Applicant omitted to include many of the Respondent’s documents and his witness statement (“reasons for opposing the application”). On 12<sup>th</sup> February 2020 (the day before the hearing) the Respondent sent a copy of the bundle of documents he relied upon to the Tribunal.
6. The pagination in the hearing bundles prepared by each of the parties was erratic. Pagination was omitted from large amounts of the bundles of each party. That said, the Tribunal and the parties were able to locate and review the documents relied upon by each party. In particular the Tribunal and the Applicant were able to consider all of the Respondent’s documents. Consistently with the overriding objective, the Tribunal declined to treat any of the Applicant’s breaches as activating the “strike out” order of 31<sup>st</sup> January 2020. Throughout the hearing, the Tribunal ensured that all parties had access to all of the documents referred to.

## Decision

7. The Tribunal finds the following
- a. The Respondent was the long lessee of 3 Winston Lodge, 12a Commercial Way, Woking Surrey GU21 6ET (“the property”) which fell within the selective licensing area of Canalside Ward Woking which came into effect on 1 April 2018 following designation by the Applicant made on 20<sup>th</sup> November 2017 (see Applicant’s documents numbered 1a, 1b, 1c and 1d ).
  - b. The property was situated in the Canalside Ward area of Woking Borough Council (“the Applicant”) at the relevant times between 1 April 2018 and 24 March 2019.
  - c. The Respondent let the property to Ms Claire Bennett during the period 1 April 2018 to ~~21~~ 25<sup>th</sup> March 2019.
  - d. The property should have been licensed for letting from 1 April 2018. The Respondent’s application for a selective licence was not received until 25 March 2019 (see e-mail of that date from Applicant at item [15] of Respondent’s bundle).
  - e. The property was unlicensed for the period 1 April 2018 to 25 March 2019;
  - f. During the period 1 April 2018 to 25 March 2019 the Respondent received housing benefit payments in respect of the tenant in at that property the sum of £4,553.79.
  - g. On 15 October 2019 the Applicant sent a Notice of Intended Proceedings (“the NIP”) to the Respondent and gave 28 days in which to make representations. On 18<sup>th</sup> November 2019 representations were received from the Respondent.
  - h. The Tribunal is satisfied beyond reasonable doubt that the Respondent was in control of, or managing the property between 16<sup>th</sup> October 2018 and 24<sup>th</sup> March 2019 when it was a “Part 3 House” required to be licensed under Part 3 of the Housing Act 2004 (“the 2004 Act”) but was not so licensed.
  - i. The Tribunal orders the Respondent to repay housing benefit to the Applicant in the sum of £535.38 to the Applicant within 28 days (being 6 weeks’ housing benefit at £89.23 per week);
  - j. The Tribunal makes no order for reimbursement of hearing or application fees upon the application of the Applicant.

## **Issues to be determined**

8. The Tribunal and the “Respondent’s reasons for opposing the application” identified the following issues, which arose from the documents and written submissions in the hearing bundles:
  - a. Has the Applicant persuaded the Tribunal beyond reasonable doubt that the Respondent committed an offence under section 95(1) of the 2004 Act by managing or controlling the property during the dates alleged (1 April 2018 to 25 March 2019)?
  - b. As part of that same issue: (i) has the Respondent established the evidential basis for showing a reasonable excuse why a licence was not obtained (if it should have been obtained) and (ii) has the Applicant proved beyond reasonable doubt such an excuse was not made out?;
  - c. What is the effect of the Applicant’s omission to serve the Notice of intended proceedings (“the NIP”) under section 42 of the 2016 Act until 18 October 2019?
  - d. Was the grant to the Respondent of a licence for the property on 18th November 2019 for the period from 1<sup>st</sup> April 2018 a defence to the allegation that the property was unlicensed contrary to section 95 of the 2004 Act?
  - e. Was the Applicant in breach of its duty to inform the Respondent of the need for a licence for the property?
  - f. Should the Tribunal exercise its discretion to make an RRO if the conditions in section 41 are otherwise satisfied?
  - g. The amounts if any of any rent repayment order and whether any of the non-exhaustive list of factors in section 45(4) of the Housing and Planning Act 2016, namely (a) the conduct of the landlord, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

This was expressed to be a provisional list of issues which could be reviewed as the hearing progressed.

### **Issue (a): Was an offence committed between 1st April 2018 and 25<sup>th</sup> March 2019?**

9. The Tribunal reminded itself when considering this issue that the burden of establishing the commission of the offence was upon the Applicant. The offence alleged was the Respondent was the landlord in control or managing the property between those dates when selective licensing designation was in place, when the property was not so licensed, contrary to section 95(1) of the 2004 Act.

10. Unlike some others, the offence of having control of or managing a house which is required to be licensed under section 85 of the 2004 Act but which is not so licensed, is committed whether or not the person accused of the offence, knew, intended or was reckless as to whether s/he was contravening the legislation or committing the wrongful act.
11. The Tribunal Judge reminded the parties when the Applicant had finished giving evidence, that the Respondent was not obliged to give evidence and could choose to make observations about the strength or otherwise of the Applicant's case and other issues without giving evidence. The Respondent is an extremely intelligent, articulate and sophisticated gentleman who followed the proceedings with ease. The Tribunal formed the view that he was able to present his case as well as many trained lawyers. He chose to give evidence. Before considering the Respondent's grounds for opposing the application, the Tribunal considered the essential elements of the offence.

**Was this a Part 3 House required to be licensed under the 2004 Act?**

12. For a licence to be required the property must have been "a Part 3 house" at the date of the alleged offence (1 April 2018 to 25 March 2019). "Part 3 house" is defined by sections 100, 85(5) and 79(2) of the 2004 Act as a "house" which is
  - (a) "..... in an area that is for the time being designated under section 80 as subject to selective licensing, and
  - (b) the whole of it is occupied either—
    - (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or
    - (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4)."
13. For the purpose of part 3 the word "house" is defined by section 99 of the 2004 Act as follows:

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling;

"house" means a building or part of a building consisting of one or more dwellings;

and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it)."

14. It was not disputed that at the relevant times the property was a single storey flat on the 2<sup>nd</sup> floor of a 4 storey mixed use block built after 1980 occupied by Claire Bennett: see the Respondent's application for a licence including answers to questions 7 and 8 completed on 24 03 2019 (part of Respondent's document 14). The ground floor of the block was occupied by JF Seymours Limited ("Seymours") who incidentally were the Respondent's letting agents. Although that application for a selective licence described Seymours as managing agents, it was accepted that they took no active role in applying for or not applying for the licence for the property and that they were the Respondent's letting agents rather than managing agents: (see e-mails of 15 02 2018 and 16 02 2018 passing between them and the Respondent - Respondent's documents 9 and 10).
15. A significant part of the hearing and of the Respondent's case, focussed on his contention that at the material time, the property was not within the selective licence area because it was not within the location plan or map which he and his partner had viewed on the Applicant's website on 5<sup>th</sup> and 6<sup>th</sup> December 2017. The Tribunal considered carefully whether there was a reasonable doubt about whether the property was in the Applicant's selective licence area specified in its designation between 1st April 2018 and 25th March 2019.
16. The Respondent's evidence and that of his partner Deborah Boles was that the location plan of the designated area viewed on the Applicant's website in December 2017 did not extend south west of Stanley Road to Commercial Way as depicted on the drawing at page 1c of the Applicant's bundle forming part of the Notice of Designation.
17. The Tribunal took into account the Respondent's evidence that on 12<sup>th</sup> December 2017 he applied for a licence for another property let or managed by him at 12 Grosvenor Place, Burleigh Gardens Woking to the east of Stanley Road in the "Canalside ward" of Woking. The licence application for 12 Grosvenor Place, Burleigh Gardens, Woking was acknowledged by the Applicant on 20<sup>th</sup> December 2017: see documents 3 and 4 of the Respondent's documents. The Respondent asserted that he was a responsible and respectable landlord who would have applied for a licence for the property at the same time as he applied for the licence for 12 Grosvenor Place, had he believed that it required a licence.
18. Deborah Boles, the Respondent's partner provided a witness statement which was undated but said by her to have been prepared on 7<sup>th</sup> January 2020. She says that in December 2017 she looked at the Applicant's website containing the link in Richard Browne's e-mail of 5<sup>th</sup> December 2017 (Respondent's document 1) <https://www.woking.gov.uk/housing/landlords/privatesectorhousing/landlords/selectivelicensing>. (Richard Browne was a co-owner of the block in which 12 Grosvenor Place was located). Deborah Boles' evidence was that the Map she viewed "was not the one now published but one which showed the selective licensing are ending just past Grosvenor Place at Stanley Road". Deborah Boles recalled that she discussed with the Respondent at some length the reasons for Grosvenor Place being included within the licensing area "as it was a block with

good facilities at the upper end of the Woking rented flat market”.

19. The evidence of Mr Moss and Amanda Cooper of the Applicant in response was that the designation of the licensing area of Canalside Ward had not changed from that made on 20<sup>th</sup> November 2017 at documents 1a, 1b and 1c of the Applicant’s documents. The Applicant’s witnesses gave evidence that the Respondent’s request for a copy of a different map (an earlier version of the map upon the Applicant’s website) had not been met because there was no such earlier version. Despite extensive Freedom of Information requests from the Respondent since this application was commenced, no evidence had emerged that a separate or amended map had been published upon the Applicant’s website or that the designation had changed since November 2017. Amanda Cooper indicated that some 120 properties west of Stanley Road depicted on the drawing of the designated area had applied for a selective licence before 1<sup>st</sup> April 2018. That part of Amanda Cooper’s evidence was not directly challenged and the Tribunal accepted that evidence.

20. The requirements for publication of the designation required by section 82(3) of the 2004 Act (and the area covered by the designation area) are set out in the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373. In particular regulation 9 provides (in its material parts):

“(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 property where the designation may be inspected; and
  - (iii) the property 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.”

21. When asked by the Respondent about attempts to inform landlords of the selective licensing area, Amanda Cooper referred to steps taken by the Applicant to comply with the regulations which broadly included the steps required by those Regulations (although she did not mention the regulations by name). That evidence was not seriously challenged by the Respondent.
22. The Respondent asked Seymours, his agents for copies of relevant documents, when he realised that an application for an order was being made against him. Among other things, Seymours responded with an e-mail on 4<sup>th</sup> December 2019 (16:36) which he produced as Respondent's document 23. That e-mail attached as part of Respondent's document 23 what the author Helen Blower described as “a map of the Selective Licensing Area which I downloaded from the [Applicant's] website on 1<sup>st</sup> February 2018”. That map is identical to the map attached to the designation relied upon by the Applicant in these proceedings.
23. The Applicant does not appear to have received any similar complaint to the effect that the boundaries to the selective licence area changed



between December 2017 and April 2018. There is no independent or other evidence to support the Respondent's contention that a different map was present on the website on 5<sup>th</sup> or 6<sup>th</sup> December 2017 or that the map attached to the designation or on the website had changed without any record or consultation. Such a change would be a significant infringement of regulation 9 of the 2006 Regulations.

24. The Tribunal does not doubt the genuineness of the belief of the Respondent about what he saw, or that of his partner Amanda Boles. Their evidence was given in good faith. Nevertheless the Tribunal is satisfied so that it is sure that the property was within the designated area for selective licencing in the area described as Canalside Ward of Woking between 1<sup>st</sup> April 2018 and 25<sup>th</sup> March 2019. It is also satisfied beyond reasonable doubt that the Respondent did not have a licence for the property for that period for the reasons given below.
25. The Tribunal does not doubt the sincerity of the Respondent and Deborah Boles. However their evidence was a long way from showing that the Respondent was misled about the location of the selective licensing area whether by the map on the Applicant's website or by other information given by the Applicant by telephone or otherwise.
26. The Applicant very properly did not suggest that the Respondent or Amanda Boles were guilty of any misconduct in asserting their recollection of what they saw upon the Applicant's website. The Tribunal's task when recollections are advanced relating to events which occurred some time ago, and some time before the need to investigate the issue became apparent, is to evaluate the evidence. The Tribunal's role in such evaluation has been described in a very different context by the Court of Appeal in *Goodman v Faber Prest* [2013] EWCA 153 (at paragraph 17) as follows:

“Although much emphasis is quite properly placed on the advantage given to the trial judge of seeing and hearing a witness give evidence, it is generally acknowledged that it is difficult even for experienced judges to decide by reference to the witness's demeanour whether his evidence is reliable. Memory often plays tricks and even a confident witness who honestly believes in the accuracy of his recollection may be mistaken. That is why in such cases the court looks to other evidence to see to what extent it supports or undermines what the witness says and for that purpose contemporary documents often provide a valuable guide to the truth. In *Armagas Ltd v Mundogas S.A.* [1985] 1 Lloyd's Rep.1, at page 57 col. 1. Lord Goff described his own experience as follows:

“Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular

regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.”

Although Lord Goff was there referring to cases involving fraud, his remarks hold good for any case in which a witness's credibility is a central feature.”

27. It should be emphasised there is no suggestion of lack of good faith or misconduct by the Respondent or Deborah Boles in this case. However the remarks about evaluating evidence remain of assistance.
28. There is a critical difference between the context of the *Goodman* decision where the burden of establishing the causation of injuries lay with an injured Claimant on the balance of probabilities and the position here where the Applicant is required to satisfy the Tribunal so that it is sure that the version of the map or drawing in its designation was the same as it was in April 2018 (so as to include the area in which the property was located).
29. In order to evaluate the defence put forward by the Respondent, the Tribunal reviewed the documentary and other evidence to see if there was any evidence which might create a reasonable doubt about the designation of the area in which the property was located. The Tribunal has done this bearing in mind it is for the Applicant to disprove the assertion that the property was not within the designated area. It is not for the Respondent to convince the Tribunal of the truth or accuracy of their defence that the property was not within that area during the dates of the alleged offence.
30. None of the Applicant's responses to the Freedom of Information requests have been shown to be inaccurate or defective. Nor is there reason to cast doubt upon those responses, apart from the assertions of the Respondent. No evidence was led from Seymours the agents who investigated the requirements of the designation in the area. No evidence was led which might have cast doubt on the Applicant's assertion that the plan of the designation was accurate. If there had been such a change of designation to include properties to the west of Stanley Road without due consultation or publication, at least one other person might have been expected to have been misled in the context of the large numbers of properties within the Canalside ward (however described).
31. The Tribunal carefully considered the Respondent's contention (part of his “Second reason for opposing the application” “that Doc 26, Executive September 2017, (Doc 26b) item 1.21 identifies the Maybury area north of the railway line as the focus for this Scheme.” assisted his contention that there was a change in the map or the area between the time when he

looked at the web page on the Applicant's web site and the date when the designation came into effect. Item 1.21 was part of a 14 page document dated 14<sup>th</sup> September 2017 entitled "Licensing Private Rented Accommodation Proposal to make a selective licensing designation in part of Canalside Ward". After the end of that document there was reference to appendices which were not copied into the Respondent's hearing bundle.

32. The Respondent's oral evidence was that he regarded the Maybury area north of the railway line" as north or north east of Stanley Road (i.e. excluding the area where the property was located) but no evidence supporting that understanding was produced. On its face paragraph 1.21, does not begin to support the Respondent's reading that the area in which the property was located was excluded.
33. The Respondent did not produce the map referred to in paragraph 1.24 of that document as Appendix 1 or the list of residential addresses referred to in Appendix 2. The Tribunal accepts that there was no burden upon him to produce evidence to establish his innocence. That said, when assessing that document and whether it establishes the evidential basis for the argument that there was a reasonable doubt that the designation in December 2017 or April 2018 showed an area excluding the property, the Tribunal finds those omissions do not enable any weight to be placed upon that document. That document is not support for his contention that there was a map different from that depicted in the designation exhibited as document 1c to the Applicant's bundle of documents.
34. The Respondent contended another part of the document assisted him in his "Second reason for opposing the application". That was "Recommendations for the Executive Committees (Doc 26c) item 4, included under LIC17-003 (ii) that officers be authorised officers of the Council". The Respondent contends "These Officers clearly made changes to the Scheme which included changes to the start date from 1 Feb 2018 to 1 March 2018 [Doc 26c 4 (ii)+(Doc 26f 2 (ii)] and then 1 April 2018, the fee structure and changes to the Scheme area from Maybury as noted above, to include the town centre." This document was examined during the course of the hearing and the Applicant's officer (Mandy Cooper) commented that document (and earlier parts of the larger document) concerned licensed taxi drivers. The part relied upon by the Respondent however together with paragraph 1.21 read as follows:

"EXE17-041

**RECOMMENDED to Council**

**That (i) the Head of Democratic and Legal Services be delegated authority to designate a selective licensing designation under the Housing Act 2004 within the area of Canalside Ward set out In the report and at Appendix 1 and Appendix 2 to the report;**

**(ii) the selective licensing designation come into**

- force on 01 March 2018;**
- (ill) the selective licensing designation cease on 28 February 2023;**
- (iv) the fee structure for the selective licensing scheme set out in Appendix 9 to the report be adopted and subsequently**

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**reviewed as part of the Council's fees and charges setting process;**

- (v) the Strategic Director for Housing, in consultation with the Portfolio Holder, be delegated authority to amend the Council's Houses in Multiple Occupation Licensing Policy to incorporate the introduction of selective licensing and rename as the Housing Standards Licensing Policy; and**
- (vi) the Strategic Director for Housing, in consultation with the Portfolio Holder, be delegated authority to make minor amendments to the Housing Standards Licensing Policy.**

Reason: Following completion of the public consultation in respect of the proposal to introduce a selective licensing scheme in part of Canalside Ward, U is now appropriate for a decision to be made whether to proceed with the scheme.

If it is agreed that the scheme be introduced, the Council Is required to make a designation for the scheme and delegated authority is required for this purpose.

The introduction of the scheme will also require amendments to the Council's Houses *in* Multiple Occupation Licensing Policy to incorporate the selective licensing scheme, and it is proposed that this policy •be renamed. The provision of delegated authority to make minor amendments to this policy will ensure that the policy can readily be updated to reflect minor legislative change.”

- 35 From these documents the Respondent reasoned as follows in his “Second reason for opposing the application”:

“Two possibilities exist: the wrong map was put on the website

and later changed or the area covered by the scheme was changed. WBC have not supplied enough information for me to know which.”

This reasoning assumes what it sets out to prove - that there was a change to the area of the scheme or the wrong map was put up on the website. The Tribunal is not looking to see if the Respondent’s contention that there was a change is accurate or correct, but only whether he has raised an evidential basis for contending that there was a reasonable doubt. This additional part is consistent only with speculation that a change to the map took place or the wrong map was put upon on the website because, in the Respondent’s view these paragraphs authorised officers of the Applicant to do so.

**Issue (b) (i) has the Respondent established the evidential basis for showing a reasonable excuse why a licence was not obtained and (ii) has the Applicant proved beyond reasonable doubt such an excuse was not made out**

36. The Tribunal’s task is to assess whether those circumstances (including a genuine belief that no licence was required) would have amounted to a reasonable excuse for managing the property without a licence. The defence of “reasonable excuse” is a common feature of regulatory and other criminal legislation in the consumer protection context. It is context specific. As the Tribunal canvassed in argument in an analogous context, examples might include where a person is prevented by physical or mental incapacity from complying with a legislative requirement. Concrete examples might include illness or detention. It was made clear that these were only examples. There might be other circumstances which might amount to a reasonable excuse.
37. The Respondent’s evidence confirmed that, had it not been for his mistaken belief that a licence was not required for the property, he was able to apply for and obtain a licence as he subsequently did. Accordingly, there was not a reasonable excuse for managing or being the landlord of the property without a licence.

**Issue (c): The effect of the Applicant’s omission to serve the Notice of intended proceedings (“the NIP”) under section 42 of the 2016 Act until 18 15th October 2019**

38. Section 42 of the 2016 Act provides:
  - “(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.
  - (2) A notice of intended proceedings must—
    - (a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,
    - (b) state the amount that the authority seeks to

recover, and

(c) invite the landlord to make representations within a period specified in the notice of not less than 28 days (“the notice period”).

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.”

39. The NIP was sent by first class post on 1<sup>st</sup> 15<sup>th</sup> October 2019 according to the Applicant’s evidence in the application form section 9.
40. An issue arises as to the effect of section 42(5) of the 2016 Act. On the Applicant’s case the offence was being committed from 1st April 2018. The NIP was not served until some 18 months’ later. This provision bears some comparison with the six month time limit for bringing an information alleging an offence contained in section 127 of the Magistrates Courts Act 1980. That 6 month time limit applies to the similar offences of having control of an HMO without a licence contrary to the Management of Houses in Multiple Occupation (England) Regulations 2006 and the Housing Act 2004 section 234(3), and the offence of managing an HMO without a licence contrary to section 72(1) of the 2004 Act: see *Luton BC v Altavon Luton* [2020] Crim. L.R. 81.
41. The effect of non-compliance with section 42(5) of the 2016 Act is that an RRO cannot be made in respect of period ending 12 months preceding service of the NIP. This is also consistent with the finding in *Luton BC v Altavon Luton* that the offence of managing or having control of property which should have had a license but did not were a continuing offence committed each day that the HMO is unlicensed.
42. In this case this means that the RRO can only be made in respect of period after 1st October 2018, if the other conditions in sections 43, 44 and 45 of the 2016 Act are made out.

**Issue (d): Was the grant to the Respondent of a licence for the property on 18th November 2019 for the period from 1<sup>st</sup> April 2018 a defence to the allegation that the property was unlicensed contrary to section 95 of the 2004 Act?**

43. It was common ground the Respondent applied for a licence for the property on 25<sup>th</sup> March 2019, shortly after the need for licence was drawn to his attention. A licence was granted on 18th November 2019 in terms that stated that it would come into force on 1<sup>st</sup> April 2018 (section 19 of the Respondent’s bundle).

44. The Respondent's case, prefigured in his written "Reasons for opposing the order" on this issue had three parts.
45. Firstly the Respondent argued that at the date of the hearing and the date of the application he held a Selective Licence valid for the period of the alleged offence. His written case (supported by his oral evidence) was that he "was contacted by the Applicant on 6 March 2019" (Respondent's Document 13) and advised of the need for a Licence. His reading of that letter was that provided he applied within 28 days he would receive a licence valid for 1 year and not face prosecution or a financial penalty of up to £30,000. The Tribunal finds that is an impossible reading of the Applicant's letter of 6<sup>th</sup> March 2019. That letter does not contain such an offer or a promise that no prosecution would take place – simply a warning that if he failed to apply within 30 days the Applicant would consider whether it was appropriate to instigate prosecution. The Tribunal is satisfied so it is sure that this could not amount to an offer of retrospective licence or that a licence was granted retrospectively.
46. Secondly the Respondent sent his application for a licence on 25<sup>th</sup> March 2019 (Respondent's Document 14). His position was that when he described the circumstances to one of the Applicant's unnamed officials, he said it was agreed that he would not be required to pay the late application fee of £560. The Respondent received a draft licence for approval (Respondent's Document 16) which stated that the licence would come into force on 01 April 2018 and remain in effect until 31 March 2023. The Respondent said his "agreement" to this was emailed 17 October 2019 (Respondent's Document 17.) The Respondent's NIP was received on 16<sup>th</sup> or 17<sup>th</sup> October 2019 and he "reasonably assumed that this had been sent in error and crossed in the post, as his Licence had been approved for the period 1 April 2018 to 31 March 2023". He therefore did not respond with representations, at that time. The Tribunal is satisfied beyond reasonable doubt that this course of events did not amount to an offer of a licence by the Applicant or that a licence was granted retrospectively from 1<sup>st</sup> April 2018.
47. Thirdly the Respondent says that on 18 November 2019 he received the Licence which was "in line with the terms of the draft Licence to which he had agreed, i.e. coming into force 01 April 2018". The Notice of Decision sent with the Licence contradicted the Licence terms in that it stated, '*The operative time the grant of licence comes into force within 28 days from the date the decision was made without an appeal having been made.*' The Respondent argues "this was a new clause which had not been in the draft Licence or the Notice which accompanied it". The Respondent did not consider this clause to be part of the Selective Licence as it was not a condition included in the draft Licence which he says was "agreed between the parties". The Respondent says he believes that he currently holds a valid Selective Licence issued retrospectively in line with the decision made by Applicant on 9 October 2019 and the application for a RRO "is therefore invalid".
48. The Tribunal is satisfied so it is sure that the terms of the licence granted

by and enclosed with the Applicant's letter of 18<sup>th</sup> November 2019 (Respondent's document 19) did not validate retrospectively the absence of licence from 1<sup>st</sup> April 2018 to 1<sup>st</sup> March 2019. This is clear when the terms of the licence itself are considered. In particular one part of the "Notice of decision" reads "The operative time the grant of the licence comes into force will be 28 days from the date when the decision was made without an appeal having been made". This made it clear that the Applicant considered that no licence was in place previously.

49. By 18<sup>th</sup> November 2019 the Applicant had served the NIP upon the Respondent. The Respondent had written complaining about the NIP in his letter of 18<sup>th</sup> November 2019. The Respondent can have been under no illusion when he received the licence in late November 2019 that the Applicant had abandoned the allegation that he had committed an offence by not having a licence for the property.
50. If the Respondent was not satisfied with the licence offered or if it did not reflect what he says was offered, his remedy was to appeal as the terms of the licence document indicated clearly. He did not do so. He must be taken to have accepted the terms of the licence, at least for the purpose of these proceedings.

**Issue (e) Was the Applicant in breach of its duty to inform the Respondent of the need for a licence?**

51. This point was raised as a defence by the Respondent in his reason for opposing the application. As the Tribunal Judge mentioned this defence was raised by the Defendant in the Divisional Court decision of *Thanet District Council v Grant* [2015 EHC 4290]. A similar argument advanced was that the Defendant had a reasonable excuse for not applying for a selective licence because he was unaware of the need to do so and the local authority had failed to comply with its duty to take steps to inform him of the need for a licence under section 85(4) of the 2004 Act and that he was a diligent landlord with an exemplary record. It was held that the duty upon a local authority to inform under section 85(4), was not a duty owed to individual landlords but a target obligation. Accordingly a failure to comply with that duty leading to ignorance of an individual landlord did not amount to reasonable excuse under section 95(4) of the 2004 Act. This is not a valid defence.

**Issue (f) Should the Tribunal exercise its discretion to make an RRO if the conditions in section 41 of the 2016 Act are otherwise satisfied?**

52. It is clear from the use of the word "may" in section 43 that there is a discretion whether or not to make an RRO if a relevant offence has been committed and an NIP has been served: see *LB Newham v Harris* [2017] UKUT 0264 (LC). Circumstances which might be relevant to the exercise of the discretion might encompass abuse of prosecutorial position, double jeopardy (if criminal proceedings had been commenced for the same offence in respect of the same period) or other abuse of process.



53. There are no circumstances which would incline the Tribunal to exercise discretion against making an RRO in this case.

**Issue (g) The amount of the RRO**

54. For the reason given above concerning the delay in serving the NIP the Tribunal considers it is only open to the Applicant to seek an RRO for the period between 19<sup>th</sup> October 2018 and 25<sup>th</sup> March 2019.
55. The Tribunal accepts the circumstances in which the offence as committed were at the very lowest end of the scale of seriousness. As soon as the omission was pointed out to the Respondent, he took steps to rectify the omission and applied for a licence. The Respondent had applied for a licence for the Grosvenor Place property. The Tribunal accepts his evidence that had he been aware of the need to apply for a licence for the property before April 2019 he would have done so.
56. The Applicant did not suggest that the condition of the property was substandard or that the tenant had suffered any prejudice by reason of the failure to secure a licence by April 2018. The Applicant pointed to the Respondent's negative answer to question in section 17 of the licence application form "Does the propose licence holder.. own or manage other properties which require a licence under the Housing Act 2004" when he applied for a licence for the Grosvenor Place property owned by him. The Tribunal has some sympathy for the Respondent when he responded to that question. The online form only permits of binary response "Yes" or "No". On one view, it was a poorly worded question as it assumed a knowledge of which properties might or might not require a licence. That question does not appear to be mandated by Schedule 2 to the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373.
57. The Applicant did not allege there were aggravating features to the circumstances in which the property came to be unlicensed, such as the Respondent's conduct. The Respondent has not been convicted of an offence. This is not case where the Tribunal considers the issue of deterrence arises as the offence was not committed intentionally or recklessly.
58. The Respondent was asked if he wished to offer evidence about his financial circumstances but did not do so. The Respondent accepted that he had not been asked to pay the licence fee for the property in the circumstances of this case
59. The upper limit for an RRO in this case is by reference to the amounts paid to the tenant for a period not exceeding 12 moths during which the Respondent was committing the offence. For the reasons given above, only the period between 29<sup>th</sup> October 2018 and to 1<sup>st</sup> March 2019 is relevant in this case (some 18 weeks)
60. This was a case where the Applicant's representative accepted that the possibility of resolving the request for an RRO by a consent order (that is

by negotiation or agreement with the Respondent) does not appear to have been considered. The Tribunal encourages such alternative dispute resolution as it can in some cases minimise the use of resources by the parties and the Tribunal. Taking all those factors into account the appropriate level of an RRO in this case is 6 weeks housing benefit at the weekly rate of £89.23 specified by the Applicant in an annex to the NIP for the period commencing from 29<sup>th</sup> October 2018 (i.e. £535.38).

61. As this was a case where the Applicant was unable to demonstrate that a Tribunal hearing was required to obtain an RRO, the Tribunal does not consider it appropriate to order the Respondent to reimburse the Applicant for the hearing fee or application fee.

H Lederman  
Tribunal Judge  
16 March 2020

Amended 27<sup>th</sup> April 2020 pursuant to rule 50 of the 2013 Rules.

#### **RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.