Neutral Citation Number: [2024] UKUT 324 (LC)

Case Nos: LC-2024-191 and LC-2024-521

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

REFS: LON/OOBK/HMF/2023/0113 (LC-2024-191), LON/00AM/HMF/2023/0323 (LC-2024-5210

18 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – meaning of "the period of 12 months ending with the day on which the application is made" – date and time at which a defence takes effect

BETWEEN:

KIMBERLEY RUTH SING TZE MOH (1)
ALESSANDRO FACCIORUSSO (2)
SOFIA SANIA SERRANO (3)

Appellants
(LC-2024-191)

-and-

RIMAL PROPERTIES LIMITED

Respondent

Flat 501, Jerome House,
14 Lisson Grove,London,
NW1 6TS

DR JAMES KIELY (1)
MS HOLLIE SAUNDERS (2)
MR JOSEPH HIGGINS (3)

Appellants
(LC-2024-521)

-and-

BOSTALL ESTATES LIMITED

Respondent

Flat 3, 8 Reighton Road, London, E5 8SG
Upper Tribunal Judge Elizabeth Cooke on 8 October 2024
Royal Courts of Justice

In LC-2024-521, Mr Justin Bates KC and Mr Peter Sibley for the appellants, instructed by JMW Solicitors LLP acting pro bono. Mr Karol Hart for the respondent of Freemans Solicitors

In LC-2024-521 Dr James Kiely represented the appellants. Ms Mandeep Heer represented the respondent

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The following cases are referred to in this decision:

Dodds v Walker [1981] 1 WLR 1027

Gurusinghe and others v Drumlin Ltd [2021 UKUT 268 (LC

Lester v Garland 33 ER 748

Luton Borough Council v Altavon Luton Ltd [2020] HLR 4

Matthew v Sedman [2021] UKSC 19

Segal v Young [2001] NSWCA 141

Stewart v Chapman [1951] 2 KB 792

R v Waltham Forest Borough Council [2020] 1 WLR 2929

Introduction

1. These two appeals were listed together because they both raise the same point: how long does a tenant have to make an application for a rent repayment order against a landlord who has been managing a house in multiple occupation ("an HMO") without a licence after he has acquired a defence to the offence created by section 72(1) of the Housing Act 2004? In both appeals the Tribunal has to decide at what point in time the defence takes effect. In one appeal I also have to decide the meaning of the words:

> "… the period of 12 months ending with the day on which the application is made."

2. In both cases the tenants made an application to the First-tier Tribunal, which decided that it had no jurisdiction to make a rent repayment order because the application was made too late. The tenants now appeal with permission from the FTT.

3. In LC-2024-191, which I will call the Jerome House appeal, Kimberley Moh and her fellow tenants were represented by Mr Justin Bates KC and Mr Peter Sibley (instructed by JMW solicitors, all generously acting pro bono), and the landlord Rimal Properties Limited by Mr Karol Hart, Solicitor Advocate of Freemans Solicitors. In LC-2024-521, the Reighton Road appeal, Dr James Kiely represented himself and his fellow tenants, and the landlord Bostall Estates Limited was represented by its legal adviser Ms Mandeep Heer. I am most grateful to them all.

The legal background

4. Part 2 of the Housing Act 2004 provides for a licensing regime for HMOs. Section 72(1) creates the offence of managing or being in control of an HMO that requires a licence and is not licensed, but provides for a number of defences to that offence:

> "(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.
> …
> (4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–
>> (a) a notification had been duly given in respect of the house under section 62(1), or
>> (b) an application for a licence had been duly made in respect of the house under section 63,
>
> and that notification or application was still effective (see subsection (8)).
> (5) In proceedings against a person for an offence under subsection (1) … 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), or
>> (b) for permitting the person to occupy the house, or
>> (c) for failing to comply with the condition,
>
> as the case may be.

…

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of [the FTT]) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn."

5. Two of the defences created by section 72 are relevant to these appeals. In the Reighton Road appeal the respondent had the defence of reasonable excuse under section 72(5); in the Jerome House appeal the relevant defence was that of having applied for an HMO licence, under the section 72(4)(b). Section 72(4)(a) is not part of the factual matrix of either appeal but reference will be made to it in due course; the defence arises when the person managing or in control of the HMO has notified the local housing authority, pursuant to section 62(1), that he or she intends to take steps to secure that the house is no longer required to be licensed (for example, requiring the tenants to leave). On receipt of that notification the authority may serve on that person a "temporary exemption notice" under section 62(2), with the effect that the house is not required to be licensed for three months. Before that notice is given, the house is still required to be licensed, but the person managing or in control of it has a defence to the section 72(1) offence by virtue of having given the notification under section 62(1).

6. 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. Section 41(2)(b) of the 2016 Act says this:

"(2) A tenant may apply for a rent repayment order only if:

…(b) the offence was committed in the period of 12 months ending with the day on which the application is made."

The factual background and the FTT's decisions

7. I need say very little about the facts in either appeal; they are straightforward and not in dispute, as if devised for an examination with the facts neatly lined up so as to create a legal problem but with one slightly different from the other so that the examiner can say "how would your answer differ in the following case?".

The Jerome House appeal

8. On 4 May 2021 Ms Moh, Ms Facciorusso and Ms Serrano took a tenancy of flat 501, Jerome House, 14 Lisson Grove, London NW1 from the respondent, their landlord Rimal Properties Limited, which holds a long lease of the building. It is not in dispute that the flat was throughout their tenancy an HMO that required a licence, under the additional licensing scheme introduced by the Westminster City Council in April 2021.

9. On 4 May 2022 the respondent applied for an HMO licence at 13:44.

10. On 4 May 2023 the appellants made their application to the FTT at 15:36.

11. The FTT decided that it did not have jurisdiction to make a rent repayment order. It held that the appellants were two days too late because

    a. the defence in section 72(4)(b) took effect from the first moment of the day, so that the last day on which the offence was committed was 3 May 2022 and

    b. the "period of 12 months ending with the day on which the application is made" (section 41(2)(b) of the 2016 Act) began at the first moment of 5 May 2022.

The Reighton Road appeal

12. The respondent is the leasehold owner of Flat 3, 8 Reighton Road, London E5 8SG. On 8 October 2020 it granted a tenancy to Dr Kiely, Ms Saunders and Mr Higgins for a fixed term of 12 months; new tenancies were granted in September 2021 and September 2022. It is not in dispute that the flat was throughout that time an HMO and should have been licensed, again because the local housing authority had introduced an additional licensing scheme.

13. On 16 November 2022 the respondent made an application for an HMO licence but was not able to pay the fee because the local housing authority's website was not functioning. At 16:00 on 16 November the respondent emailed the authority to alert it to the problem, and received a response at 18:02 explaining that the payment system was down and promising to tell the respondent when the problem was resolved. The fee was paid in December once the website was in order.

14. Thus on 16 November 2022 the respondent was not able to acquire the defence of having made an application for an HMO licence under section 72(4)(b) of the 2004 Act because its application was not "duly made" as that provision requires. However, the FTT held that because payment was impossible on that date it did have the defence of reasonable excuse from 16 November 2022 so that the last day on which the offence was committed was 15 November 2022. The section 72(4)(b) defence took effect once payment was made. The FTT held that that payment was made "within a reasonable time" of the respondent being told that payment could be made, so that there was no gap between the two defences, and there is no appeal from that finding.

15. Consistently with its decision in the Jerome House appeal the FTT held that the last date on which the respondent committed the offence was 15 November 2022 and that it had the defence of reasonable excuse from 16 November 2022 onwards. The application to the FTT

was made on 15 November 2023, and therefore was out of time so that the FTT could not make a rent repayment order.

The appeals

16. In the Jerome House appeal the FTT granted permission to appeal on two issues:

> "(i) Was an offence committed up to 13.32 on 4 May 2022? The Tribunal held that the last day on which an offence was committed was 3 May 2022.
>
> (ii) How is "12 months ending with the day on which the application is made" to be computed? The Tribunal found that the 12-month period ran from 00.00 on 5 May 2022."

17. Permission was granted by the FTT in the Reighton Road appeal on the ground that:

> "The appeal raises an important point of principle on the computation of time. Is an offence committed on the day that a landlord applies for (or uses reasonable endeavours to apply for) an HMO licence?"

18. So one issue – what is the last day on which the offence was committed? – is common to both appeals, while the second issue, namely the extent of the period of 12 months specified in section 41(2)(b) of the 2016 Act, is engaged only in the Jerome House appeal.

19. The timing pattern in the two appeals is slightly different. In the Reighton Road appeal the appellants made their application to the FTT not on the date corresponding to the date on which the events constituting the defence took place, but one day before the corresponding date. However, if the period of 12 months did run from the date of the application to the FTT back to the corresponding date (15 November 2022) then the appellants could succeed in a different way. The Reighton Road appellants have not appealed the FTT's finding about the length of the period, which would cause something of a problem if the Jerome House appellants were to succeed on that point. However, they have not succeeded, as will be seen, and so the problem does not arise.

20. Because of the difference in the timings, the Jerome House appeal can succeed only if the appellants succeed on both issues. As will be seen, they fail on both, and therefore in whichever order I decide the two issues a decision on the second is strictly unnecessary in the Jerome House appeal. However, I am going to decide both issues in any event because, despite the difference in timings and in the number of issues on which permission to appeal has been granted, both issues are important to both groups of appellants. Moreover the arguments presented by Mr Bates KC on both issues were interlinked, relying in part on the same case law, and it would be unhelpful and somewhat artificial to refer only to half of his argument.

21. In light of that I address first the computation of the 12-month period, and then go onto discuss the second issue about when a defence takes effect.

The first issue: what is the "period of 12 months ending with the day on which the application is made"?

The arguments

22. In the Jerome House appeal the landlord applied for an HMO licence on 4 May 2022 and the tenants made their application to the FTT on 4 May 2023. So, as I noted above, in order for the appeal to succeed the appellants have to show *both* that the offence was being committed on 4 May 2022 *and* that the 12-month period included the whole of both 4 May 2022 and 4 May 2023.

23. The cornerstone of the arguments presented by Mr Bates KC was that the law disregards fractions of a day. Three cases, he said, establish that point. The first is *Lester v Garland* 33 ER 748, decided in 1808, in which Sir William Grant MR said:

> "Our law rejects fractions of a day more generally than the civil law does. … The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referrible to any one, than to any other, portion of it ; but the act and the day are co-extensive ; and therefore the act cannot properly be said to be passed, until the day is passed."

24. The context there was a will which required a beneficiary to give security for her promise not to marry a named individual within 6 months of the testator's death on 12 January, failing which the residuary estate passed to her children – obviously not a fact pattern that could occur today, but that does not matter for present purposes. The beneficiary gave the security late in the evening of 12 July, and the issue was whether she was in time. She was; the remainder of the day after the testator's death on 6 January was disregarded and time started to run at the first moment of 13 January. The Master of the Rolls stressed that he was not making a rule; but later cases have treated his decision as such.

25. Thus in *Stewart v Chapman* [1951] 2 KB 792 the Divisional Court (Lord Goddard CJ and Ormerod J) had to decide whether an information had been laid with magistrates within 14 days of the commission of the offence. The Lord Chief Justice referred to *Lester v Garland* and to subsequent cases which treated it as having laid down a general rule that where time is computed after or within a certain event, the day of the event itself is excluded. And in *Matthew v Sedman* [2021] UKSC 19 the Supreme Court had to decide whether proceedings had been commenced within six years so as not to be time-barred under the Limitation Act 1980. Lord Stephens, with whom all the justices agreed, referred at paragraph 27 to *Lester v Garland* and said "subsequent authorities have consistently adopted the principle of rejecting fractions of a day".

26. Mr Hart agreed that fractions of days are not to be taken into consideration, but without reference to the above cases. His point was simply that the statute refers to a period of 12 months "ending with the day" on which the application to the FTT is made; on that basis he argued that the calculation must involve full days.

27. I agree with both advocates that one solution to this question that is not available is that the 12-month period is the year began at 15:36 on 4 May 2022, precisely 12 months before the application to the FTT was made. I agree with that for the reason given by Mr Hart; in my

judgment the statute itself makes the point clear by specifying a period ending with a date rather than a time. I am not convinced that the cases referred to by Mr Bates KC are relevant because they are about a different issue, which was how to calculate a period after an event, or a period "within a certain time" of an event.

28. But at any rate, it is agreed that the period specified in section 41(2)(b) of the 2016 Act is composed only of whole days.

29. As to which those days are, or how many of them there are, Mr Bates KC argued that the answer is determined by the "corresponding date rule." It derives from the case of *Dodds v Walker* [1981] 1 WLR 1027 where the question was the extent of the period within which a business tenant may apply to the court for a new tenancy after receipt of a notice under section 25 of the Landlord and Tenant Act 1954 where section 29(3) said the tenant had "four months after the giving of the landlord's notice." At p1029 A to C Lord Diplock said:

> "My Lords, reference to a " month " in a statute is to be understood as a calendar month. The Interpretation Act 1889 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester* ^ *v. Garland* (1808) 15 Ves.Jun. 248, that in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon C the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given.
> The corresponding date rule is simple. It is easy of application. Except in a small minority of cases, of which the instant case is not an example, all that the calculator has to do is to mark in his diary the corresponding date in the appropriate subsequent month."

30. So *Lester v Garland* is cited as the origin of the rule, and the rule is consistent with the rule operated in the limitation cases, whether expressed as disregarding the first fractional day or as counting on a number of months to get the corresponding date 6 months later.

31. In the present case therefore, according to Mr Bates KC, the period includes both 4 May 2022 and 4 May 2023.

32. Mr Hart in his skeleton argument pointed out that *Dodds v Walker* and the limitation cases are all considering the meaning of a period "after" an event, or a date "within" so many months of an event. The words of the statute here are different: the requirement is that:

> "the offence was committed in the period of 12 months ending with the day on which the application is made."

33. I asked Mr Bates KC whether that wording means something different period from the wording the statute did *not* use, namely:

> "the offence was committed in the period of 12 months before the day on which the application was made."

34. According to Mr Bates KC there is no difference between the two formulations. He referred to a further passage in *Dodds v Walker* at p. 1029 H where Lord Diplock said that the 1954 Act:

> "refers to periods to be reckoned in months and was passed at a time when the corresponding date rule had been recognised for more than a century as applicable in reckoning periods of a month after the occurrence of a specified event."

35. Accordingly, he argued, there is a general rule of which Parliament is aware and which is to be followed regardless of the precise wording of the statute.

Discussion and conclusion

36. I agree with Mr Bates KC that the corresponding date rule clearly applies when we have to compute time after a specified event. The rule is well-established and has the virtue of simplicity. I infer that the same rule is to be followed when we have to compute a period before a specified event.

37. So if the statute had required that the offence must have been committed within the period of 12 months before the appellants make their application to the FTT, then the corresponding date rule would apply and the period would run from the first moment of 4 May 2022.

38. I do not agree that the same result follows from the wording of section 41(2)(b). A period of 12 months ending on a particular date is not the same – as a matter of ordinary language – as the period of 12 months before that date. The language implies that the start and end date are each within the period. It therefore starts not on 4 May 2022, whose beginning is more than 12 months away from any point during 4 May 2023, but at the first moment of 5 May 2022. I agree that what was said in *Lester v Garland* has been treated as a general rule and that Parliament is to be taken to be aware of the corresponding date rule derived from *Lester v Garland* and stated in *Dodds v Walker*; but had Parliament wanted that rule to apply it would have used the language with which that rule is associated, by specifying a period "after" or "before" or "within so many months of" another event.

39. I do not agree that the period is to be interpreted in a way that is generous to the tenants, so as to be consistent with the limitation cases where the period excludes the date of the wrong complained of so as to give the potential claimant the full limitation period. Again, had parliament intended consistency with the way that limitation periods are expressed it would have used the language of such periods in order to specify the period in question, by referring to 12 months "before" the application to the FTT or "after" the last day on which the offence was committed. Instead, a distinctly different form of words was used whose plain meaning is different and which is not within the contemplation of the limitation cases or of the cases that use the corresponding date rule.

40. Accordingly I agree with the FTT; the period is one of 12 months, it started on 5 May 2022 and ends with the date on which the application is made, 4 May 2023.

The second issue: when does a defence take effect?
The arguments

41. The facts in the Jerome House appeal will now be familiar: the HMO licence was applied for in the afternoon of 4 May 2022, and the appellants applied to the FTT in the afternoon of 4 May 2023. The facts in the Reighton Road appeal follows a slightly different pattern; there the landlord had the defence of reasonable excuse from, or from some point on, 16 November 2022 and the appellants applied to the FTT on 15 November 2023. That is why the Reighton Road appellants do not need the corresponding date rule. But for their appeal to succeed they need to establish that the landlord did not have a defence on 16 November 2022 but only from the first moment of 17 November 2023.

42. As discussed above this point is no longer necessary for the Jerome House appeal because the decision that the corresponding date rule does not apply means that the Jerome House appellants fail in any event. But I decide it in any event, for the reasons I gave at paragraph 20 above, and also so as to give the appellants in the Reighton Road case, who were not legally represented, the benefit of the arguments presented by Mr Bates KC.

43. Mr Bates KC's argument was directed to establishing that the respondent was committing the offence throughout 4 May 2022. He therefore sought to argue that the defence provided by section 72(4)(b) (i.e. that the landlord has applied for a licence) did not take effect until the first moment of 5 May 2022.

44. His starting point was that the offence created by section 72(1) is a continuing offence; it is committed afresh each day the landlord is managing or in control of an HMO that needs a licence and does not have one. That I think is obvious but if authority is needed it is provided by *Luton Borough Council v Altavon Luton Ltd* [2020] HLR 4, and by *R v Waltham Forest Borough Council* [2020] 1 WLR 2929. The latter case was mostly concerned with the fact that the offence is one of strict liability but at paragraph 51 the Dingemans LJ giving the judgment of the Divisional Court said:

> "It was common ground that the offence under section 72(1) of the 2004 Act was a continuing offence: see generally Luton Borough Council v Altavon Luton Ltd [2020] HLR 4, para 8. This meant that every day that a person was managing or in control of an HMO which required to be licensed but was not licensed was a new offence."

45. As Dr Kiely put it for the appellants in the Reighton Road appeal, when he woke up on 16 November 2022 the landlord was committing the offence. As Mr Bates KC put it, the actus reus of the offence was complete on the first moment of the day when the licence application was made.

46. Mr Hart did not disagree with the proposition that this is a continuing offence, but he pointed out that the cases relied upon for that proposition say nothing about the position on a day when events or actions take place which give rise to a defence.

47. The second plank of Mr Bates KC's argument is that fractions of days are to be disregarded. The authority for that is, again, the three cases relied upon for that point in connection with the length of the period: *Lester v Garland, Stewart v Chapman* and *Matthew v Sedman*, see paragraphs 23 to 25 above. Mr Hart did not disagree.

48. However, on this point the appellants in the Reighton Road appeal took a different approach; Dr Kiely argued that the defence takes effect at the point in time when the events giving rise to the defence take place. He referred to the words "at the material time" in section 72(4), which he regarded as relevant equally to the defence of reasonable excuse under section 72(5).

49. I address that point of difference below. In the Jerome House appeal it is agreed that we are dealing only in whole days – but which part of the day is to be disregarded?

50. Mr Bates KC noted that in *Gurusinghe and others v Drumlin Ltd* [2021 UKUT 268 (LC) the Tribunal (HHJ David Hodge KC) said, in passing and without discussion, that the defence took effect the day after an application was made for a licence; but he acknowledged that the point was not in issue and not argued and rightly did not place much weight on the case. I note that no rent repayment order was made in that case for other reasons and I do not think the case can be relied upon at all for this point.

51. Mr Bates KC argued that the respondent should not get the benefit of his belated application for a licence until the next day; his application should not take effect so as to give him the benefit, in the hours before the application was made, of an action he should have done long before. He pointed out that there is no authority for extending the defence to cover the whole day; as he put it, no-one has ever disregarded part of a day in favour of someone doing wrong. On the other hand there is authority, in the form of the cases about time periods, for disregarding the day on which an action is done, and the reasoning in those cases is relevant in the present case. Just as the day on which an event takes place is disregarded so as to ensure that a potential claimant gets the benefit of the whole of the limitation period, so also the present case is a form of limitation provision and the Tribunal should decide the question so as not to prejudice the tenants who have a defined period in which to make their application. As he put it, we are dealing with a provision that has a limitation effect, and limitation provisions are not to be construed in favour of defendants. Accordingly the defence takes effect after the end of the day on which the events that constitute the defence took place: the first moment of 5 May 2022 for Jerome House, the first moment of 17 November for Reighton Road. Mr Bates KC also relied upon the Australian case of *Segal v Young* [2001] NSWCA 141, at paragraph 19:

> "On a common sense approach, the issue is not one of subtlety. The paramount principle is that the statutory period limitation period is six years and a plaintiff is entitled to the full period within which to bring proceedings. Anything less than the full six year period will result in a plaintiff not being 24 granted the time afforded by the statute. At common law, a day is not divisible and fractions of a day are not recognised: Prowse v McIntyre. Thus, if a limitation period expires on a given day, the cause of action is regarded as having been extinguished as from the next day.
> 20 The approach that I propose is in accord with the principle that "[a] limitation provision, because it derogates from the ordinary rights of individuals, should be

strictly construed" (per Mason CJ, Deane, Toohey and Gaudron JJ in *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471). In accordance with this principle, where ambiguity exists, limitation statutes are construed favourably to plaintiffs."

52. Mr Hart and Ms Heer disagreed with the appellants and both argued that the defence took effect for the whole day. Ms Heer argued that in construing a statute that creates a criminal offence, in a case of ambiguity such as this, the court should lean in favour of offender. Mr Hart pointed to three provisions of the 2004 Act which he said indicated that the defence takes effect for the full day on which the application for a licence was made. The first was section 72(8), which it is convenient to repeat here:

> "(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn…"

53. Mr Hart argued that the reference to "a particular time" indicates that the defence takes effect at the time the facts giving rise to it take place; so once the application has been made (or a temporary exemption notice received from the local housing authority), from that time onwards the defence is operative, and also for the first part of the day since we are not concerned with fractions of a day.

54. Second, Mr Hart pointed to section 55(5) of the 2004 Act, which sets out the "general duties" of the local housing authorities to secure the effective implementation of the licensing regime. Section 55(6)(b) requires the local authority to take such steps as it considers appropriate to comply with that duty:

> "within the period of 5 years beginning with the date of the application for the licence."

55. Thus, he said, the licence application takes effect and has to be acted upon by the local authority on the day that the application is made, and that means that the defence must take effect on the same day.

56. Third, Mr Hart referred to section 62 of the 2004 Act. It sets out the procedure for temporary exemption from the licensing requirement, to which I referred above at paragraph 5 above. It will be recalled that once a person managing or in control of an HMO gives notice to the local housing authority of the steps being taken to regularise the position of an unlicensed HMO, the local authority may give a temporary exemption notice. Giving notice to the local housing authority under section 62(1) is a defence to the section 72(1) offence, by virtue of section 72(4)(a). Section 62(3) and (4) reads as follows:

> "(3) If a temporary exemption notice is served under this section, the house is (in accordance with sections 61(1) and 85(1)) not required to be licensed either under this Part or under Part 3 during the period for which the notice is in force.
> (4) A temporary exemption notice under this section is in force–
> (a) for the period of 3 months beginning with the date on which it is served, …

57. So the local authority's temporary exemption notice is effective from the date on which it is served. In the same way, for the purposes of section 72(4)(b), an application for a licence should take effect on the date on which it is served. Mr Bates KC in response argued that the analogy does not work; the temporary exemption notice is given by the local authority, not by the landlord, and has the effect that the HMO does not require a licence (so that no offence can be committed and no defence is needed). That tells us nothing about the operation of the defences in section 72(4).

Discussion and conclusion

58. Taking the points made by Mr Bates KC in turn: first, I agree that the offence is a continuing offence. That does not advance matters; as Mr Hart pointed out, the cases relied upon did not involve a defence and do not answer the question in issue here.

59. Second, I agree with Mr Bates KC and Mr Hart that fractions of a day are to be excluded, but I do not agree that the authorities relied upon by Mr Bates KC are determinative of the question in this context. They are all asking a different question, namely how time periods are computed. None is looking at the point in the day at which the defence took effect.

60. However, the difficulty with looking at fractions of a day is obvious. In the Jerome House appeal we know the time at which the respondent applied for a licence because the application was made electronically. But the matter is not always clear cut. In the Reighton Road appeal a different defence is engaged, the defence of reasonable excuse, because the respondent did all it could to complete its application by paying the fee but could not do so because the local housing authority's system was down. So at what point did the defence take effect? When the respondent first tried to pay? Ms Heer indicated that it did so at 09:00, but the FTT made no finding of fact as to when that was. Was it when the respondent emailed the local housing authority to alert it to the problem, which the FTT said was at 16:00? Or was the defence operative from the point when the system went down if indeed that happened during that day (which is not known)? The practical difficulties in determining the point in time when the defence kicks in are obvious. Dr Kiely argued that the appellants did not rely upon a particular time but upon the fact that for at least part of the day the offence was being committed. But if the defence is available only for part of the day it will in some cases be necessary to be able to say exactly when it took effect, so as to ascertain whether in fact it was effective throughout the day. For example, in the present case if the respondent tried to pay at the first moment of the business day, and if in fact the website was inoperative throughout the 24 hours of 16 November, it is arguable that the defence took effect at the first moment of the day.

61. Accordingly it makes sense to disregard parts of a day when deciding when a defence takes effect, not because the limitation cases say so (because they are looking at a different question) but for the sake of simplicity and for the avoidance of impossible questions. I say that despite the fact that the statute refers to "the material time" (section 72(4) at paragraph 4 above); I agree with the FTT that that refers to a date, not to a particular time of day.

62. Finally, which part of the day is to be ignored – or, put another way, in which part of the day is there to be a fiction, or a deeming operation? Just taking the Jerome House facts for this purpose because the timing is clear-cut: do we disregard the time before 13:44, when no

application had been made, and say that the defence has effect all day? Or do we disregard the time from 13:44 onwards when the application has been made, and say that nevertheless the offence is still being committed?

63. In my judgment the cases relating to the computation of time – *Lester v Garland* and the other cases referred to in paragraphs 23 to 25 above – are not relevant to the present question. The decisions that require the day on which an act is done to be disregarded are looking purely at the time period that follows that action; they cannot be used to determine when the action itself takes place. Obviously, the cases cited did not need to do so because the time when the event took place was not in doubt: in *Lester* itself it was a death, in *Stewart v Chapman* the offence was one of driving without due care and attention, and *Matthews v Sedman* was about a missed deadline at midnight. There was no question about when any of those things happened. And there is no authority that requires the interests of potential civil claimants who face a limitation period to be taken into account when determining when a particular event happened in any civil case, let alone in a criminal context where the issue is when did a defence take effect.

64. I would add that the period specified in section 41(2) of the 2016 Act is not the same kind of limitation period as those imposed by the Limitation Act 1980. As it was said in *Segal*, a limitation period derogates from the ordinary rights of claimants. The provision in section 41(2)(b) does no such thing. Instead it is part of a series of provisions that create a time-limited right for tenants to apply for a rent repayment order. That is not a right that they would have at all absent this suite of provisions; nothing is taken away from them. Instead, provisions aimed at the penalisation and deterrence of housing offences give the tenants a right to apply for a rent repayment order for a limited period, rather than giving them an open-ended right.

65. In my judgment therefore the point is free from authority.

66. I do not think that the provisions to which Mr Hart referred are determinative of the question. Section 72(8) refers back to the "material time" in section 72(4) and does not add anything to it, and it is agreed, at least in the Jerome House appeal that the "material time" has to be a whole day not a time. Section 55(6) is certainly consistent with the defence of having applied for an HMO licence taking effect as a defence for the whole day, but it does not provide a definitive answer to the question. And section 62(4) is not relevant, for the reason given by Mr Bates KC (paragraph 57 above).

67. If the cases on time limits are not authority for the answer to the present question, are they of assistance in terms of policy? I do not think so. The facilitation of applications for rent repayment orders is not an overriding consideration in determining this question. Far more important is the fact that this is a matter of criminal liability. Faced with a choice between deciding that a landlord is committing an offence throughout the day on which he applies for a licence, and deciding that he has a defence throughout the day on which he applies for a licence, I have no hesitation in choosing the latter. Put another way, because I have to disregard fractions of a day I prefer to say that the landlord has a defence in the morning because he applied for a licence later in the day, than to say that he is committing an offence all afternoon and evening even though he has already applied for a licence.

68. I therefore agree with the FTT which said: "If there is any ambiguity, we should lean in favour of the potential offender" (paragraph 62 of the Jerome House decision, paragraph 54 of the Reighton Road decision).

69. In conclusion on this point, the last date on which the respondent in the Jerome House appeal committed the section 72(1) offence was 3 May 2022, and the last date on which the respondent in the Reighton Road appeal committed the offence was 15 November 2022. Accordingly both appeals fail on this point.

Conclusion

70. Both appeals fail; the FTT was right to conclude that it had no jurisdiction to make a rent repayment order in either case.

Upper Tribunal Judge Elizabeth Cooke
18 October 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.