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Case No: LC-2024-781

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Ref: LON/OOAM/HMF/2024/0010

Royal Courts of Justice, Strand,
London WC2A 2LL

15 July 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – time limit for making application – defence of reasonable excuse – whether offence was being 'committed' for the purpose of the 12 month time limit for making an application at a time when the landlord had a reasonable excuse for managing an unlicensed HMO – s.72, Housing Act 2004 – s. 41(2)(b), Housing and Planning Act 2016 – appeal dismissed

BETWEEN:

ANDREW KEMP (1)
WILLIAM LOWE (2)
PATRICK HINTON (3)
RUBY CORCORAN (4)

Appellants

-and-

DIP SYSTEMS (UK) LIMITED

Respondent

Flat 1, 35 Reighton Road,
London E5

Martin Rodger KC,
Deputy Chamber President

Determination on written representations

The following cases are referred to in this decision:

DDP for Northern Ireland v Lynch [1975] AC 653

Tesco v Nattrass [1972] AC 153

Introduction

1. This appeal from the First-tier Tribunal, Property Chamber (the FTT) raises a short point about the time limit for a tenant to make an application for a rent repayment order under Part 2 of the Housing and Planning Act 2016 (the 2016 Act).

2. By section 41(1) of the 2016 Act a tenant may apply to the FTT for a rent repayment order against a person who has committed one of seven housing offences listed in section 40(3). Section 41(2)(b) then provides:

> 'A tenant may apply for a rent repayment order only if –
>
> (a) …
>
> (b) the offence was committed in the period of 12 months ending with the date on which the application is made.'

3. One of the offences to which rent repayment orders apply is the offence of being a person having control or management of an unlicensed HMO contrary to section 72(1) of the Housing Act 2004 (the 2004 Act). Section 72(5) of the 2004 Act provides a defence to that offence if the person concerned had a reasonable excuse for having control of or managing the unlicensed HMO.

4. The question raised by the appeal concerns the relationship between the statutory defence of reasonable excuse and the statutory time limit that the offence must have been committed in the period of 12 months ending with the date of the application for a rent repayment order: is an offence 'committed', in the sense intended by section 41(1)(b), at a time when the person concerned had a reasonable excuse for having control of or managing the unlicensed HMO.

5. The FTT decided that no offence was committed by the respondent while it was managing an unlicensed HMO at a time when it had a reasonable excuse for doing so without a licence. That meant that in this case the application for a rent repayment order brought against the respondent by its former tenants of the HMO, was out of time.

6. The appellants now appeal the FTT's decision with the permission of this Tribunal. The appeal has been determined on the parties' written representations which were prepared for the appellants by Mr Jamie McGowan of the advocacy group, Justice for Tenants, and responded to for the respondent by its solicitors, Jury O'Shea LLP. I am grateful to them both for their assistance.

Relevant statutory provisions

7. Part 2 of the 2004 Act provides for the licensing of HMOs. With certain exceptions, section 61 provides that every HMO to which Part 2 applies is required to be licensed. A temporary exemption from this requirement can be obtained if the person having control of the HMO notifies the local housing authority under section 62(1) that they intend to take steps to secure that the house is no longer required to be licensed.

8. Generally Part 2 applies only to HMOs of a prescribed description so only those are required to be licensed (section 55(1)), but by section 56 a local housing authority may designate the whole or part of its district as subject to additional licensing in relation to any description of HMO specified in the designation. If such a designation is made, Part 2 of the 2004 Act will also apply to HMOs of the specified description (section 55(2)(b)).

9. By section 72(1) of the 2004 Act a person commits an offence if they have control of or are managing an HMO which is required to be licensed under Part 2 of the Act but is not so licensed. Additional offences are provided by section 72(2) (knowingly allowing an HMO to be occupied by more persons than permitted by its licence) and section 72(3) (failure to comply with conditions).

10. Section 72 also provides as follows:

> '(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–
>
> (a) a notification has 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), (2) or (3) it is a defence that he had a reasonable excuse–
>
> (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
>
> (b) for permitting the person to occupy the house, or
>
> (c) for failing to comply with the condition,
>
> as the case may be.
>
> (6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.
>
> (7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.'

The facts

11. The four appellants were tenants of the respondent at Flat 1, 35 Reighton Road (the Property) from March 2021 until May 2023. The Property was an HMO throughout the period of their occupation, and it was required to be licensed by an additional licensing scheme introduced by the London Borough of Hackney, which ran from October 2018 to September 2023.

12. The respondent did not have a licence when it let the Property in March 2021 and first tried to obtain one on 16 November 2022, when its agent completed the online application on Hackney's licensing portal but was unable to pay the required fee because of a fault with the payment system. When the agent contacted Hackney on 16 November, he was informed by email that the payment system was down and that he would be contacted when it was back up and running. The agent was not contacted by Hackney, but when he made further enquiries on 5 December, he was informed on 8 December that the system was functioning again and that payments could be received. The agent then arranged payment of the fee, which was completed on 15 December. Hackney subsequently acknowledged that, but for the fault with their system, the licence application would have been made on 16 November 2022.

13. On 29 November 2023 the appellants applied to the FTT for a rent repayment order, seeking to recover all of the £27,028 which they had paid in rent for the period from 16 December 2021 to 15 December 2022. In answer to the application the respondent said that it had a reasonable excuse for being in control of the HMO without a licence between 16 November and 15 December 2022 because it had done all that it reasonably could to apply for a licence during that period and had only been unable to do so because of Hackney's defective payment system.

The FTT's decision

14. The FTT found that the respondent had had made out the defence under section 72(5) because it had had a reasonable excuse for managing the HMO without a licence from 16 November and that the last date on which the offence had been committed was 15 November 2022. As no offence had been committed during the period of 12 months ending on 29 November 2023, the date of the application for the rent repayment order, the FTT decided that the application had been brought out of time and dismissed it on that basis. But in case they were wrong, they also considered the evidence fully and determined that they would have ordered repayment of £13,514 if the application had been made in time.

The appeal

15. The appeal is based on the proposition that the availability on a particular day of a defence of reasonable excuse does not mean that, on that day, the relevant housing offence was not being 'committed' for the purpose of section 41(2)(b) of the 2016 Act. The appellants contend that the offence was committed on every day on which the respondent was a person in control of or managing an unlicensed HMO which ought to have been licensed. If the respondent could avail itself of a reasonable excuse offence, it would not be guilty of the relevant offence and could not be punished for it, but that did not mean that the offence had not been committed. In short, the effect of the statutory defence was to excuse the offence, not to deny that it had been committed.

16. This proposition was supported in interesting and detailed submissions by Mr McGowan. He distinguished between what he called a 'freestanding defence', meaning one which is entirely separate from the provisions creating the corresponding offence, and a 'defence on the merits', meaning the absence of an essential ingredient of an offence. Only a defence on the merits has the effect that there is no offence. Academic writers to whom Mr McGowan referred have made this distinction, as did the House of Lords in *DDP for Northern Ireland v Lynch* [1975] AC 653, when considering whether the defence of duress was available to a charge of aiding and abetting murder. The same distinction was clear in *Tesco v Nattrass* [1972] AC 153, a case under section 24 of the Trade Descriptions Act 1968 which provided a defence in proceedings for an offence under the Act where 'the commission of the offence' by the person charged was due to a mistake, or the act of another person or some other cause beyond his control. Lord Diplock observed that:

> 'The section speaks of "the commission of the offence" notwithstanding that the person charged may have a defence to the charge under subsection (1). This language refers to a stage in the proceedings at which the prosecution have proved facts necessary to constitute an offence of strict liability on the part of a principal. This is all that it is incumbent upon the prosecution to prove. The onus then lies upon the principal to prove facts which establish a defence under the subsection.'

17. Mr McGowan sought support for the application of this distinction from a wide range of sources, including the CPS Code for Crown Prosecutors, Guidance to local housing authorities on rent repayment orders and standard forms published by the FTT. While I accept that these demonstrate that an applicant for a rent repayment order is not expected to satisfy themselves of the guilt of the respondent at the stage of making their application and is not required to show that there is no defence, they do not help us understand what Parliament meant when it enacted section 41(2)(b).

18. It was relevant, Mr McGowan suggested, that in Chapter 4 of Part 2 of the 2016 Act the operative elements of the rent repayment order regime can be divided into two groups, sections 41 and 42, which he referred to as 'the application provisions', and sections 43 to 46 which he dubbed 'the substantive provisions'. The application provisions, including section 41(2)(b) which contains the relevant time limit, relate only to the making of the application and describe a procedural stage of

the proceedings before any consideration of guilt or penalty is required. The application provisions are clearly directed towards applicants, and there is no need to interpret the word "committed" as referring to guilt, or to require the absence of a free standing defence; it should be taken instead to refer to the existence of the elements of the offence which it is necessary for the applicant to establish. Only later, in the substantive provisions, which are concerned with determination of liability and penalty, and which are directed at the FTT, is it clear that 'committed' connotes guilt, as in section 43(1), which provides that a rent repayment order may be made if the FTT is satisfied, beyond reasonable doubt, 'that a landlord has committed an offence'.

19. Mr McGowan suggested that the important distinction between the two sets of provisions is that the 'application provisions' describe the circumstances in which tenants or local housing authorities may apply for a rent repayment order whereas the substantive provisions describe decisions to be made by the FTT. He submitted that when interpreting the reference in section 41(2)(b) to the commission of an offence regard should be had only to the matters to be established by applicants in order to make a successful application, not to the absence of matters which must otherwise be established by landlords in response to an application, such as a reasonable excuse defence, which form part of the Tribunal's decision making. This was consistent with the application provisions relating to rent repayment orders sought by local housing authorities which require that a preliminary notice of intended proceedings be given, allowing the landlord to make representations. By section 42(5) such a notice 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. That demonstrates that whether a landlord has 'committed the offence' does not require a consideration of whether the landlord may be able to make representations offering a reasonable excuse. When a local housing authority makes the decision to serve a notice of intended proceedings and considers whether an 'offence was committed' in the previous 12 months, its assessment does not involve a consideration of the absence of the freestanding defence under section 72(5) of the 2004 Act.

Discussion

20. The issue in this appeal is one of statutory interpretation. It is not a question of jurisprudence or legal theory. I intend no disrespect to Mr McGowan's scholarly submissions if I focus on those parts of his argument which directly concern the proper interpretation of the statute.

21. As *Tesco v Nattrass* demonstrates, when a statute refers to an offence having been 'committed' it does not necessarily mean that someone who 'committed' it is guilty of the offence and liable to punishment. Notwithstanding that it may refer to the commission of the offence, the statute may nevertheless allow for an exculpatory defence. As a matter of language, determining that an offence has been committed and establishing that someone is guilty of the offence may be different exercises. I therefore accept the existence, in some contexts, of the distinction on which Mr McGowan relies.

22. Mr McGowan acknowledged that in what he called the substantive provisions of the 2016 Act the word 'committed' is used to refer to circumstances in which guilt has been established. It is not possible to read section 43(1) as giving the FTT power to make a rent repayment order against a landlord who has 'committed an offence' if the same landlord has established a reasonable excuse defence.

23. The same must be true of section 72 of the 2004 Act. Section 72(6) and (7) provide that a person who commits an offence under subsections (1), (2) or (3) is liable to a fine. A person who has a reasonable excuse, and therefore a defence, will meet the description in those subsections of a person who 'commits' the relevant offence (they will have had control or management of an unlicensed HMO, or will have breached licence conditions) but are clearly not within the scope of subsections (6) or (7). The expression 'commits an offence' in section 72 clearly means 'commits an offence and cannot show that they have a defence under section 72(5)'.

24. Mr McGowan also acknowledged that it was necessary for an applicant for a rent repayment order to demonstrate the absence of certain statutory defences and that in that context the distinction he relied on between application provisions and substantive provisions was more difficult to maintain. In particular, section 72(1), 2004 Act provides that a person commits an offence if they have control of or are managing 'an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed'. It is therefore necessary for the applicant to prove that the HMO was required to be licensed under Part 2. Section 61(1) (which is incorporated into section 72(1)) excludes HMOs subject to a temporary exemption notice or a management order from the application of Part 2. It is therefore for the applicant to demonstrate that neither form of exclusion was applicable, and to explain their case in the application and lead evidence on that issue. These features of the legislation do not support the appellants' interpretation because they erode the distinction between the application provisions and the substantive provisions.

25. The effect of the appellants' interpretation of section 42(2)(b) of the 2016 Act requires that Parliament must be understood to have used the same word ('committed') intending it to mean different things in different sections dealing with the same subject matter in the same Act. That would be contrary to the usual approach to statutory interpretation, as explained in *Bennion, Bailey and Norbury on Statutory Interpretation* at section 21.3:

> 'Legislation is generally assumed to be put together carefully with a view to producing a coherent legislative text. It follows that the reader can reasonably assume that the same words are intended to mean the same thing and that different words mean different things. Like all linguistic canons of construction this is no more than a starting point. These presumptions may be rebutted expressly or by implication.'

26. There is nothing in the language of the 2016 Act to indicate that 'committed' was intended to have a different meaning in section 42(2)(b) from the meaning it is acknowledged to bear in section 43(1) and where it undoubtedly refers to circumstances in which a landlord does not have a reasonable excuse defence. It may be assumed that both provisions were drafted by the same hand and, considering their proximity, it is very difficult to believe that any distinction between the two sections was contemplated. Mr McGowan was unable to point to any clear indicator in the language of the Act suggesting inconsistent meanings were intended and he acknowledged that his argument based on the different function of different sections was not watertight.

27. The purpose of section 42(2)(b) is to impose a time limit for the commencement of applications. Time limits are generally introduced to provide certainty and to prevent stale claims and there is no principle that they should be given an interpretation intended to maximise the time available for a step to be taken. There is no obvious reason why Parliament should have considered that the clock should not begin to run down against the making of a claim from the earliest point at which a defence became available. On the contrary, it seems logical and consistent that time should begin to run against an application from the moment a landlord's behaviour ceases to be blameworthy.

28. The expectation that the same word is used consistently throughout the Act, and especially in the same group of sections, is therefore a very substantial obstacle to the acceptance of the appellants' interpretation. In the absence of some very good reason to adopt different meanings in different places, it is decisive. The practical difficulty that an applicant may not know of the existence of a reasonable excuse and may not be sure when time will begin to run against an application, is not a sufficient reason to read the statute in the unorthodox way suggested by the appellants.

Disposal

29. For these reasons I agree with the decision of the FTT that the tenants' application for a rent repayment order was brought out of time and the appeal is dismissed.

Martin Rodger KC,
Deputy Chamber President

15 July 2025

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.