FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HMS/2018/0038**
Property	**:**	**Room 4, 14 Well Hall Parade, London SE9 6SP**
Applicant	**:**	**Georgie Kathleen Taylor**
Representative	**:**	**Ms Francesca Nicholls from Flat Justice together with Miss Taylor**
Respondent	**:**	**Mina Ann Limited**
Representative	**:**	**Miss Byroni Kleopa of Counsel together with Mrs Tuyet Vo, Mr D Beecham and Mr Edmar Thompson all of the Respondent Company**
Type of Application	**:**	**Application for a rent repayment order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Ms S Coughlin**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 6th March 2020**
Date of Decision	**:**	**2nd April 2020**

DECISION

DECISION

The Tribunal determines that the Respondent has breached section 72(1) of the Housing Act 2004 (the 2004 Act) and determines that the Respondent must pay to the Applicant the sum of £900 by way of Rent Repayment Order (RRO) within the next 28 days and refund to the Applicant the Tribunal's fees of £300 also within 28 days of this decision.

BACKGROUND

1. On 13th August 2019 the Upper Tribunal in case number [2019]UKUT0249(LC) granted the appeal by Miss Taylor against a decision of the First Tier Tribunal dated 25th February 2019. It is not necessary to go into the circumstances behind the decision of the First Tier Tribunal. The Upper Tribunal, however, in allowing the appeal indicated that it would not substitute its own decision because there were two matters that needed to be considered. The first was a dispute of fact as to when the Respondent made a valid application for an HMO licence and secondly that the First Tier Tribunal would need to hear evidence in order to exercise its discretion as to the amount of any RRO that might be made.

2. It is as a result of that Upper Tribunal decision the matter came before us for hearing on 6th March 2020. Prior to the hearing we were provided with a number of documents. The first, although not necessarily in chronological order, was papers under cover of a letter which said as follows: *"We attach the material which we rely on for the new hearing of the above matter."* This included a statement submitted on behalf of the Applicant, an email from San Nyunt an HMO regulation team manager for the Royal Borough of Greenwich, the copy of the Upper Tribunal decision and the responses made to that Tribunal. In addition we were provided with copies of some email exchanges between Justice for Tenants and the Local Authority as well as between the Local Authority and Miss Tuyet Vo to which we will refer during the course of this decision. In addition to these documents we were also provided with a skeleton argument to which was attached a copy of the application for an HMO licence dated 12th May 2017 and copies of the register of title for 14 Well Hall Parade Limited.

3. On behalf of the Respondent we were provided with further submissions made by Tuyet Vo on behalf of the Respondent Company together with an email from Mr Nyunt of the Council to the Respondent and skeleton argument on behalf of the Respondent submitted by Miss Kleopa. We noted the contents of these documents.

4. During the course of the hearing we were also referred to bundles that were before the original Tribunal for the hearing in February of last year and reference was made to certain papers contained therein. It is right to say that there was some confusion as to what documentation had actually been provided to each party but we will refer to that in more detail in due course.

HEARING

5. At the hearing Miss Nicholls said that she relied on three matters. The first was an email from the Local Authority dated 29th August 2017 to Miss Tuyet which

says as follows: *"Some of the supporting documents you have submitted with the application seems to be insufficient and not very detailed for the purpose of this HMO licencing. Please see below additional documentation which you are required to forward to me as soon as possible to make a valid application:*

- *Floor plan for No 14 detailing the size and layout of each room as well as the position of fire doors and where fire detection and alarm equipment is sited. Attached is guidance for providing a plan of a property.*
- *A clear and detailed electrical installation safety certificate issued within the last five years by a qualified electrician for No 14 that covers all the nine units including the common parts.*
- *Please let me know when you will be available next week (date and time) to meet you at the Property to carry out the inspection."*

6. It was said by Miss Nicholls that this evidenced the fact that a valid application had not been made and that under the provisions of section 63 of the 2004 Act there had not been the documents provided to make the application in accordance with such requirements as the authority may specify. This impacted on the entitlement of the Respondent to rely on the defence set out at section 72(4) of the 2004 Act, that 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 sub-section 8).

7. Miss Nicholls was asked by us to comment on page 21 of the bundle that the Applicant had provided, which was an email to Guy (a person at Flat Justice) from Mr Nyunt which sets out the circumstances relating to the application confirming the following points:

- The application for the HMO licence for 14 Well Hall Parade was made on 8th June 2017
- The case was allocated to an officer and two documents were omitted but it appears were received on record on 1st November 2017.
- It was apparent from the documentation that the Property did not meet the HMO standards as published and owners were engaged to bring about necessary improvements and acquire the necessary permissions for the HMO.
- On 28th November 2017 a meeting was held when the Respondents were advised to reconfigure some part of the Property and to withdraw their application and submit a new one online.
- On 13th December 2017 the case officer issued an instruction to close the application for 14 Well Hall Parade. No fee was taken and the application was duly closed on the system on 13th December 2017.
- On online HMO application was received on 10th April 2018 and was valid. The email went on to indicate that the main reasons for asking the owner to withdraw was that the minimum standards such as kitchen sizes were not met and it had an incorrect address. The email, however, went on to say this *"the fact that the application was not formerly rejected or withdrawn means that the application in my opinion was effective. However, it is not a matter for me to decide."*

8. Miss Nicholls accepted that there was some confusion on the part of the Council and that Local Authorities have different requirements. She was not able to comment on the mandatory requirements for documentation to be produced under the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) England Regulations 2006. In further support of the Applicant's position she relied on a letter from Martin Turner, again from the Council, to Flat Justice which is headed RRO case in Greenwich 9B Wrottesley Road, Greenwich and indicates that the Council would consider an application is valid once three mandatory documents have been submitted, namely the Property plan showing the existing fire precaution, criminal records disclosure for the proposed licensee and a valid electricity certificate. It is noted that this email is dated 29th January 2019 and there was no indication as to whether or not these mandatory documents were the same as those required at the time of the application some 18 months or so earlier.

9. The second element that it was said rendered the application made in May of 2017, but by common agreement dated 8th June 2017, invalid was that the incorrect address was shown. We had sight of the application that had been made by the Respondents which does indeed refer to 14 Well Hall Parade, Eltham postcode SE9 6SP and which clearly indicates that the HMO related to the residential accommodation on the ground, first and second floor, part of the ground floor being occupied by a coffee shop. There is also reference to a loft conversion and full details are provided as to the accommodation intended to be covered by the HMO licence. In addition, on the declarations and enclosure section it confirms that plans of the Property are to follow and that an original certificate of electrical inspection carried out within the last five years was included within the application.

10. In the bundle available for the original hearing our attention was drawn to a notice by the Local Authority proposing to grant a licence in respect of the Property at 14A Well Hall Parade, London SE9 6SN following an application received online from the Respondent's director on 10th April 2018. It is accepted for the purposes of these proceedings that this was a valid application. This notice is dated 6th September 2018, but it appears that the licence was not actually granted until May of 2019.

11. Having established these matters Miss Nicholls then went on to consider the level of rent repayment order that should be ordered. We were referred to the Upper Tribunal case of Parker v Waller and it was confirmed that the Applicant sought rent for the period from 10th April 2017 to 9th April 2018.

12. The important point concerning this rental period is that the Respondents did not acquire their interest in the Property until 14th October 2016 and did not start receiving rent directly from the Applicant until July 2017. We were told, and it is not in dispute, that the Applicant paid to the original landlord, Mr Levy, one year's rent in advance. Accordingly notwithstanding that the Respondents did not receive rent from the Applicant direct until July of 2017, for the period from 10th April 2017 until July 2017 the Respondent was still liable to make a rent repayment order and for the period from July 2017 until April of 2018 also liable as during that time it had been receiving the rent.

13. For the Respondent Miss Kleopa indicated to us that there were three periods that she needed to address. The first was from October 2016 until June 2017. The second period was from June of 2017 to April 2018 and the third period from April 2018 to August 2018 when the Applicant vacated the property.

14. Dealing with the first period (October 2016 to June 20170, it was accepted that the Respondent had acquired the Property on 16th October 2016 and that the licence then existing for the Property granted to the previous owner and/or manager could not by reason of section 68(6) of 2004 Act be transferred to another person. We were referred to Counsel's skeleton argument setting out the reasonable excuse for failing to obtain an HMO licence. It was said that the Respondent was inadequately advised by her solicitors when she purchased the Property and after liaising with the Local Authority and taking further advice, which appeared to be in January of 2017, there was constant contact with the Local Authority seeking to make an application for the Property to be licenced. It was said that the Respondent had a defence pursuant to section 72(4) and (5) of the 2004 Act and that as a consequence the Tribunal could not be satisfied beyond reasonable doubt that the Respondent had committed an offence.

15. Dealing with the second period (June 2017 to April 2018) Miss Kleopa told us that it was agreed that an application had been made on 8th June 2017 in paper format. The reference to emails in the Applicant's submission being those dated 29th January 2019 and the earlier email of 29th August 2017 are not supportive of each other. It was submitted that the Local Authority appeared to have changed its requirements as to the nature of the Property because a licence had been granted for the Property to be used as an HMO very shortly before the Respondents acquired the Property, in fact on 8th September 2016. It appeared, however, following the grant of that licence, which could not be transferred to the Respondents for the reasons set out above, the Local Authority's requirements had changed fairly fundamentally as to the layout of the Property.

16. It was put to us that the email from the Local Authority issued in August 2017 referring to it being invalid was odd when compared to the intention to carry out an inspection shortly after the letter. These inspections took place on 7th September 2017 and again on 10th November 2017. At no time, however, was the application withdrawn and in fact remained current until May of 2019. Our attention was drawn to a further email from Mr Nyunt which we referred to above dated 20th September 2019 which says as follows: *"As discussed on the phone we did reject the application informally in the meeting providing the reason for that but what we should have done is to issue a refusal notice after the meeting or before closing the case. For this reason the application made on 8th June 2017 was effective."* We were referred to section 72(8) of the 2004 Act which says as follows: "For the purposes of sub-section (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 has 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 and one of the conditions set out in sub-section (9) is met." It was said by the Respondent that as there had been no withdrawal the licence application made in June 2017 was still effective.

17. We were reminded that the Applicant needed to satisfy us that the burden of proof to establish a criminal liability had to be discharged, which it was said they had not managed to do. There was no evidence that mandatory requirements were as set out in the email of 29th August 2017 from the Council and certainly that those were different from the email in January of 2019. Accordingly, for the second period, that is to say from June 2017 to April 2018), a valid application had been made and that accordingly section 72(8) applied. In the alternative, on the basis of the confusing messages emanating from the Local Authority and the inconsistent actions taken by the Royal Borough of Greenwich there was a valid excuse. There was were reminded no doubt that the paper application made in 2018 was valid. Furthermore, the question as to whether the correct address was inserted was not an issue by reference to the Land Registry documentation.

18. The third period was from April to August of 2018 when on anybody's arguments no rent repayment order could be made.

19. Miss Kleopa then addressed us as to whether or not the rent paid to the previous landlord could be claimed from the Respondent. We were referred to section 44(3) of the 2016 Act and it was asserted that the rent paid to the previous landlord could not be demanded from the Respondent as it had not been paid to that company and that company had achieved no benefit. It was submitted that the application should have been made against the previous landlord and that liability can only be against the Respondent during the time that they receive the rent.

20. In the period June 2017 to April 2018 again the primary position on the part of the Respondent was that no rent repayment order could be made. In any event it would only be for a period of some eight months and that the presumption was not that a 12 month period was the starting point but that we should exercise discretion. It was suggested that the Respondent had acted promptly by reference to a chronology that had been supplied to us and that the Respondent had endeavoured to deal with the matter based on inadequate legal advice. In addition , there was a lack of contact from the Local Authority.

21. The Respondents denied that it was an experienced property company. Agents had been retained to manage this Property but had not advised on the requirements of an HMO. We were then referred to some email exchanges which seemed to go to the conduct of the Applicant and on the question of financial circumstances we were reminded that the Respondents have had to undertake substantial work to reconfigure the Property and had large mortgage liabilities which in fact seemed to be secured in respect of three properties.

22. In final submissions to us Miss Nicholls said it was not the Tribunal's place to add words into the legislation and that the 2016 Act made no reference to previous landlords. Further it was put to us that the Respondent did not seem to have taken steps to properly deal with the lack of a licence until the end of March 2017 when it appears it came to their attention that the rent that Miss Taylor had paid to the previous landlord had not been accounted to the Respondents. Miss Nicholls submission went on to say that section 44 of the 2016 Act related only to rent paid in 12 months. There was no indication that the Respondent as a landlord had to benefit from receiving the rent and the fact that it did not was not

relevant. There then followed some exchanges concerning the condition of the Property and the fact that Miss Taylor appears to have been required to either use a kitchen on another floor or in a next door property, which she found to be unreasonable. Indeed, there was some suggestion that this may have rendered her occupancy uninhabitable. Requests had been made for rent to be reduced whilst works were undertaken to the kitchen that Miss Taylor normally used but that had not met with any positive response from the Respondent. Miss Kleopa again referred us to the Parker v Waller case and the presumptions contained therein.

23. We should mention the confused documentation. There was an objection to certain witness statements from Ms Taylors's family, which it was said had not been seen. In fact, it seems there were sent directly to the respondent but had not been passed to Ms Kleopa. Further there were papers produced in response to these applicant's documents which it was said had not been seen by the applicant. We decided that in fairness to both sides these documents would not be considered by us.

FINDINGS

24. The Respondent indicated that they sought to recover rent for the period from 10th April 2017 to 9th April 2018. This latter date is of course the day before it is accepted by both parties an application for a licence had been made online.

25. The matter that we need to determine is whether or not an earlier application for a licence had been made by the Respondents, which on common agreement had been received by the Local Authority on 8th June 2017.

26. We remind ourselves of something of the chronology of this matter. The licence was first granted to the predecessor in title to the Respondent Company on 8th September 2016. The Respondents purchased the Property on 14th October 2016 but made no application for a licence in its own right until one was said to have been made on 12th May 2017 but by common agreement was received by the Local Authority on 8th June 2017. Following this June application the Local Authority inspected the Property, discussions took place and a further application for a licence was subsequently made to reflect the Local Authority's changes in requirements. This new application was made on 10th April 2018 and is accepted by both sides as being an effective application. It appears that the first application for a licence was not revoked/withdrawn until 1st May 2019.

27. The first question therefore we need to determine is whether or not the application in June of 2017 was effective for the purposes of the Act. There are a number of contradictory emails emanating from the Local Authority which are relied upon by the Applicant to show that an effective licence application had not been made. The first they relied on and the least helpful to us is that made in January 2019 between Martin Turner and the Applicant's representative where it sets out the documents that were required and what discretionary papers may be needed. However, this email refers to a different property and also a different time when it would seem from the earlier correspondence from the Local Authority that its licencing requirements for an HMO have altered. We say that because in September of 2016 a licence was issued to the then owner of the

Property yet less than a year later it appears that those requirements did not meet the Local Authority's needs.

28. We then have an email from the Local Authority of 29th August 2017 which refers to the need to make an application valid by providing certain documentation. This is a floor plan, which on the application is stated as being provided in due course and an electrical certificate which the application says was included. Indeed, it seems that all matters had been provided to the Local Authority's satisfaction by November of 2017 and in that time there had been inspections, which led to further discussions and the new application being made. We then have an email from the Local Authority to the Applicant's representatives dated 24th January 2020 which sets out something of the chronology and states at the end *"the fact that the application was not formally rejected or withdrawn means that the application, in my opinion, was effective. However, that is not a matter for me to decide."* The author of this comment is San Nyunt, a Chartered Environmental Officer and the HOM Regulation Team Manager.

29. An issue was raised as to the address shown on the application. It is quite clear to us what property was being referred to and we do not consider that the Local Authority were confused as to the property for which the application related. The application clearly related to part of the property at 14 Well Hall Parade. Further the HM Land Registry details provided by the applicant are for 14 Well Hall Parade and disclose in the schedule of leases, two, one for flat 1 on the ground floor and another for the Upper Flat including the first, second and third floors. In our finding this issue is something of a red herring.

30. The requirements for the contents of the licence are set out at section 63 of the 2004 Act and by reference to the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006. We have had the opportunity of seeing the application that was made in May and accepted as being delivered to the Local Authority by June of 2017. This indicates that the electrical certificates were included but that a plan of the floor would follow. These are the only two issues that were raised as being missing to create a valid application in the August email from the Council. However, notwithstanding this, the Council went on to consider the application, to have meetings with the Respondent and as a result of those meetings eventually to refuse the application but not it seems until May of 2019. One then must look at section 72 of the 2004 Act and in particular sub-section (4) which states as follows*: "In proceedings against a person for an offence under sub-section (1) it is a defence that, at the material time –*

(a) Notification had duly been 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 sub-section (8))"

31. Sub-section (8) says as follows: *"For the purposes of sub-section (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 has 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 sub-section (9) is met."

32. As a matter of comment, sub-section (9) does not apply. The question therefore we need to determine is whether or not the June 2017 was an application that had been duly made and was effective.

33. We are satisfied having considered the application, reviewed the emails and the arguments put to us that this was an application which had been duly made under the provisions of section 72(4) and on the face of it, therefore, gives a defence. The question we then need to consider is whether it remained effective. The Local Authority appear to think it did, as evidenced by the email from Mr Nyunt. Nothing produced by the Applicant persuades us that the criminal burden of proof has been discharged and that we can be satisfied beyond all reasonable doubt that from June of 2017 onwards an application for a licence had not been duly made and that it did not remain effective at the time that the application was made in April of 2018, which is accepted as being such an effective application.

34. In those circumstances, therefore, we conclude that for the period June 2017 to April 2018 no offence has been committed.

35. We think it is obvious that from April 2018 to the time that the Applicant vacated, which was August 2018 an application for a licence had been made and that accordingly no rent repayment is available for that period.

36. We therefore need to consider whether or not an offence was committed in the period April 2017 to June 2017. Miss Kleopa argued for the Respondent that the rent had not been paid to that company, no benefit had been received by them and that accordingly the rent repayment order under the provisions of section 44(3) of the 2016 Act could not be invoked. It was, however, we think accepted that the Respondents did have control and management of the Property during this period. For the Applicant Miss Nicholls indicated that the legislation made no reference to any previous landlord. Further it seemed clear from the documentation and indeed the Respondent's case, that they did not realise until March of 2017 that the rent that the Applicant had been paying had not been accounted for to their benefit. It was said by Miss Nicholls that the fact that the Respondent did not receive the rent is not relevant. It was for the Respondent to have resolved the rent position with the previous owner and the Applicant should be not be prejudiced as a result of that failure.

37. For our part we can find no reference in the 2016 Act to the fact that the rent paid must have been to the landlord against whom an application for rent repayment order is made. We find that the Respondent had control and management of the Property in the period from 10th April 2017 until 8th June 2017. In those circumstances we conclude that notwithstanding the Respondent did not receive the rent, it was within its power to have acquired it and for reasons that are not clear it failed to do so. We do not think that that would be sufficient to result in

the Applicant being unable to recover against the person who had the control and management of the Property at the relevant time. We also bear in mind the fact that this Property was acquired in October of 2016 and it appears it was not until January of 2017 that the landlord realised that the licence could not transferred to the company and took steps somewhat belatedly thereafter to make the application in May of 2017 received by the Local Authority in June. A managing agent was engaged and it seems to us that an application for a licence could have been made earlier than it was. We conclude that the Respondent had no reasonable excuse for the failure to licence in this period.

38. Taking these matters into account, we conclude that there is the right for the Applicant to claim for an RRO from 10th April 2017 until 7th June 2017. This is two months less three days. Our calculation is that the daily rate is at £23, there are 58 days in the period and this gives a total rent that could be repaid of £1,334.00.

39. It seems, however, that the electricity and water was paid by the Respondent and was included within the rental payment of £700 per month. Doing the best that we can from the information available to us it would appear that the electricity worked out at around £600 per quarter giving a daily rate of £6.57 of which Miss Taylor was obliged to pay one eleventh. Our calculation therefore is that the allowance for electricity for the period of the RRO is £34.69.

40. The other element that was included is the water rates. We calculate that to be £4.09 per day based on the bills provided which gives a rate of 37 pence when divided by eleven and for the period in question a figure of £21.09. These therefore reduce the amount of the rent repayment order accordingly.

41. We were referred to the Upper Tribunal case of Parker v Waller and others a decision of the President of the Tribunal at that time. This decision was made before the 2016 Act when differing matters to be considered by the Tribunal were brought in. Those were set out at section 44(4) and are the conduct of the landlord and a tenant, the financial circumstances of the landlord and whether the landlord has been convicted of an offence. The latter does not apply in this case. This does not mean that the findings of the UT in Waller are no longer good law. Although there were allegations of Miss Taylor's behaviour in the flat, in particular having parties, and of the Respondent's failure to deal with rat issues and the kitchen, referred to, we were told in the papers we did not consider, we find that either side's conduct is such that we should reflect it in any decision we make as the quantum of the RRO. The financial circumstances of the landlord were briefly put to us. It appears that there is a substantial mortgage secured against the Property but this on the evidence we heard appears to relate to at least two other properties as well. In those circumstances it did not seem to us that there was any particular financial matter that we needed to consider.

42. We have concluded that the RRO period is for only two months. It is still necessary for us to consider what would be a reasonable sum to order as the findings in the Waller case are still to be considered relevant law and applied by us. Taking these matters into account we find that a figure of £900, that is to say approximately 70% of the total award, is the appropriate sum payable and which should be paid to Miss Taylor within 28 days.

43. We consider also that there should be a refund to Miss Taylor of the Tribunal fees of £300 again to be made within the next 28 days.

Judge: Andrew Dutton

A A Dutton

Date: 2nd April 2020

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.