



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

Case reference : **BIR/00FY/HMK/2020/0038**

Property : **22 Park View Court, Bath Street,
Nottingham NG1 1DD**

Applicant : **Mr Taylor Ryan**

Representative : **None**

Respondent : **Mr Shalim Ahmed and Mr Antonio
Ahmed**

Representative : **None**

Type of application : **Application by a tenant for a Rent
Repayment Order under the Housing
and Planning Act 2016**

Tribunal member : **Judge C Goodall
Mr V Chadha MRICS MBA MCI Arb FCIH**

**Date and place of
hearing** : **Determined on the basis of written
representations**

Date of decision : **23 September 2020**

DECISION

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Background

1. The Respondents granted the Applicant a tenancy of the Property on 6 March 2019. It was a standard assured shorthold tenancy arranged by the Respondents' agent for a six month term at £400 per month payable in full at the commencement of the term and thereafter from month to month. It was renewed on 6 September 2019 for 12 months at £400 per month.
2. On 1 August 2018, Nottingham City Council ("NCC") made an order designating the area in which the Property is located as subject to selective licensing under section 80 of the Housing Act 2004 ("the 2004 Act"). By section 95 of that Act, it is an offence for a person to have control of or manage a house which is required to be licensed but is not so licensed.
3. Chapter 4 of the Housing and Planning Act 2016 ("the 2016 Act") allows a tenant to make an application for a rent repayment order if an offence under section 95 of the 2004 Act has been committed.
4. The Applicant applied for a rent repayment order on 21 June 2020. He seeks an order for repayment of 12 months rent at £400 per month, totalling £4,800.00. The tribunal directed that both parties provide statements of their cases and that, unless either party objected, the application be determined on the basis of the written statements of case. No objection was received and the tribunal has therefore determined this application. This document gives our decision and the reasons for it.

Facts

5. From the written statements, we have been able to determine the facts as they are set out below.
6. The Respondents' have owned the Property for some 15 years. They are not local to Nottingham. They have managed the Property via a mix of local agents and through their own management company based in Stanmore, on the outskirts of London.
7. After a period of being vacant from late 2017 to early 2019, the Property was let to the Applicant through an agent called Countrywide. There is no evidence that Countrywide were aware of the selective licensing designation, or that they brought this to the attention of the Respondents. The date of the tenancy was 6 March 2019. We have seen a copy of the schedule of condition of the Property at the start of the tenancy. It appears it was in good condition then. As set out in paragraph 1 above, the rent was £400 per month. We have been provided with documentary evidence of payment of the rent for the period March 2019 until June 2020 which we accept (and indeed this has not been challenged).

8. In around April 2019, the Applicant began to have problems with damp. We have not assessed building conditions in detail. It does seem that there was a leak from 23 Park View Court, which may have caused the problems. The Applicant became dissatisfied with the Respondents response to the damp problems and contacted NCC. NCC wrote to the Respondents on 23 May 2019 giving notice that it intended to carry out an inspection of the Property on 6 June 2019 under section 239 of the Housing Act. That letter also included the following paragraphs:

“ACTION REQUIRED

Further enquiries have led us to believe your property requires a licence under one of our housing licensing schemes. According to our records, there is no such licence in place, nor have you made an application.

You have 10 days for the date of this letter to submit an application

If we do not receive an application to licence this property within 10 days, the next communication you receive from us will be a Notice of Intent to issue a Civil Penalty Notice or summons to court. We will not warn you again about your unlicensed property. A Civil Penalty Notice can be for a maximum of £30,000, whereas the Courts can issue unlimited fines and a criminal record.

We will advise your tenants and assist them with obtaining a Rent Repayment Order from the First Tier Tribunal. ...”

9. The letter also included a Notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 requiring further information from the Respondents and a separate notice under section 235 of the 2004 Act requiring a copy of the tenancy agreement.
10. The Respondents replied to the letter on 29 May 2019 with two letters, the first giving information in compliance with the section 16 Notice, and the second dealing with the section 235 Notice. In neither reply did the Respondents mention the licensing matter.
11. There is no further documentary evidence that relates to licensing until 24 October 2019. It is apparent, and we find, that on or by that date, the Respondents had commenced an application via NCC’s on-line licensing system for a licence under the selective licensing scheme. The Respondents case is that the NCC system crashed repeatedly. The system appears to save an application when a browser is closed, which generates an email to the applicant giving a link to resurrect the application. There were five occasions on 24 October when that happened to the Respondents’ application within a time period of 11 minutes.

12. More activity on the Respondents' licence application took place on 15 November 2019. Again, there were repeated emails indicating the application had closed. This time there were 13 occasions, over 32 minutes.
13. The next documented event regarding the licence application is a letter from the Respondents to NCC dated 16 April 2020, asking "Can I please hear from you with update with my licence application".
14. On 25 June 2020, NCC issued a Notice to the Respondents of their intention to grant a license in response to an application dated 28 April 2020. We therefore find that the Respondents made a valid application for a licence on 28 April 2020.

The Respondents' Statement

15. In their statement, the Respondents gave their account of their activity in applying for a licence. What they say is not corroborated by any written documents.
16. They say they commenced the licence application as soon as they were aware of the obligation to do so, in May. They were told that the application had to be submitted on-line, but each time the application process was attempted, the site would crash and it would not be possible to progress the application. They say this was queried with NCC on numerous occasions. No dates or detail of these queries was provided. The issue with the web-site occurred over an extended period of time, we were told. The Respondents say they contacted NCC on the telephone on more than one occasion. No details are given of the dates of such contacts, or the person spoken to.
17. Following their letter to NCC on 16 April 2020, the Respondents say they managed to speak to someone at NCC after a considerable time on a call. They say that in that call the technical problem was identified and that enabled the Respondents to progress the application. The Respondents do not give any detail of what the problem was or who they spoke to.

Law

18. Before a rent repayment order is made, the Tribunal must be satisfied, beyond reasonable doubt, that a designated offence has been committed (see section 43(1) of the 2016 Act). An offence under section 95 of the 2004 Act is such a designated offence.
19. The relevant part of section 95 provides:

"Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) 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 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87, and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) 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 failing to comply with the condition, as the case may be.

...

20. The standard of proof is “beyond reasonable doubt”. It is not that the offence has to be proved beyond any doubt at all (see *Opara v Olasemo [2020] UKUT 0096 (LC)*).
21. If satisfied that an offence has been committed, the tribunal must be satisfied that at the time of the offence, the Property was let to the Applicant, and that the offence was committed in the period of 12 months ending with the date of which the application is made (section 41 of the 2016 Act).
22. The amount of a rent repayment order on an application by a tenant is governed by section 44 of the 2016 Act. This requires that the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. The tribunal must take into account the conduct of the landlord and the tenant, the financial circumstances of the landlord, and whether the landlord has been convicted of an offence to which Chapter 4 of the 2016 Act applies.

23. In the case of *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) (“*Vadamalayan*”), the Upper Tribunal decided that the starting point for fixing the amount of a rent repayment order is the rent itself, in full. There is no justification for reducing the amount ordered to be repaid by deducting landlords expenses, or mortgage costs, or for ordering repayment of only the landlords profit. The previous statutory requirement that the tribunal only award a “reasonable” sum no longer applied.
24. On the question of whether a failure to licence offence is committed even if the respondent is unaware of the requirement to licence, in *Thurrock Council v Daoudi*, 2020 WL 04005713 (2020) the Upper Tribunal said:

“26. Ignorance of the need to obtain an HMO licence may be relevant in a financial penalty case in at least two different ways. There may be cases in which an ignorance of the facts which give rise to the duty to obtain a licence may provide a defence of reasonable excuse under section 72(5) . In *I R Management Services Ltd v Salford City Council* [2020] UKUT 81(LC) an experienced letting agent responsible for the management of a property comprising only two bedrooms mounted a reasonable excuse defence on grounds that he had been unaware that the property had come to be occupied by more than one household, making it an HMO. The FTT in that case was not persuaded of the letting agents' lack of knowledge but, if it had been, his ignorance of the need to obtain a licence in those circumstances would have been capable of supporting the statutory defence. **It is also possible to imagine circumstances in which a landlord had a reasonable excuse for not appreciating that a property had come within a selective licensing regime (although it would be necessary for the landlord to have taken reasonable steps to keep informed).** Short of providing a defence, ignorance of the need to obtain a licence may be relevant to the issue of culpability. Although, as the Government's Guidance points out, a landlord is running a business and ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. A decision maker might reasonably take the view that a landlord with only one property was less culpable than a landlord with a large portfolio.” (our emphasis)

Discussion

25. Our first issue is to determine if an offence under section 95 has been committed, to the criminal standard. Section 95(3) provides a defence if an application has been duly made. The NCC letter of 25 June 2020 confirms receipt of an application on 28 April 2020, and from that date, the offence was not therefore being committed.
26. From the facts outlined above, we are able to determine that the Property was not licensed until that date, it was in an area of selective licensing, and

therefore, subject to the defence of reasonable excuse in section 94(4), the offence in section 95(1) has been made out.

27. We therefore need to turn to whether there is a reasonable excuse for not having a licence. The Respondents have raised that defence in relation to:
 - a. The period during which they were unaware of the requirement to licence, and;
 - b. The period during which they were trying to submit an application for a licence but were unable to do so because of technological problems with NCC's web-site.

a. The period during which the Respondents were unaware of the obligation to licence

28. The Respondents have claimed that NCC had a statutory duty to notify them of the obligation to licence. No authority has been cited. We are unaware of any such obligation.
29. The extract from *Thurrock Council v Daoudi* cited above, however, does indicate that lack of awareness of a selective licensing designation might be considered a reasonable excuse. We have no evidence that challenges the Respondents' assertion that, not being local to Nottingham, they were unaware of the designation. We note that the Respondents used a professional agent to let the Property to the Applicant. As this is a paper case, we have not been able to interrogate the Respondents on the steps they may have taken to check any selective licensing designation, but we are prepared to give the Respondents the benefit of the doubt. We think they might reasonably have relied on a professional agent to carry out such checks when letting. There is considerable doubt in our mind that NCC would prosecute for failure to licence in respect of a period prior to a notification to a potential offender of their obligation to licence. We do not think it would be in the public interest to prosecute in this situation.
30. Having considered these points carefully, we do not think we can determine to the criminal standard that the Respondents committed an offence prior to the notification to them of their obligation to licence, which was on 23 May 2019.
31. In the letter of 23 May, NCC gave the Respondents 10 days to make their application. We do not think that had the Respondents submitted their application within that period, NCC would have prosecuted, or sought a civil penalty. Otherwise there would have been no point in allowing a grace period for the Respondents to apply for their licence. We are of the view therefore that for the period 23 May to 1 June 2019, there would have been no prospect of a successful prosecution for an offence under section 95, because no prosecution would have started, and if it had, the defence of reasonable excuse would have been likely to succeed.

32. We therefore find that the period during which we are satisfied that an offence under section 95 was being committed is 2 June 2019 to 27 April 2020 (subject to our further consideration in section b. below).

b. The period during which the Respondents were trying to submit an application for a licence but were unable to do so because of technological problems with NCC's web-site

33. We consider that if an application cannot be made because a local authority is placing insurmountable barriers in the way of the application, that would be likely to constitute a defence of reasonable excuse.
34. Our consideration is therefore of whether the story provided by the Respondents convinces us that there were insurmountable barriers put in their way. Put shortly, we are not convinced.
35. We considered the documented evidence (see paragraphs 11 – 13 above). We accept that on 24 October and 15 November 2019, there were some difficulties with NCC's web-site. The letter dated 16 April 2020 does not help us much, as all it does is enquire about the application.
36. We also considered the undocumented material summarised in paragraphs 15 – 17 above. This is an account that we can give little weight to, because crucial facts are simply not given. At no point are we given dates or details of the actions said to have been taken, nor were any of these actions followed up in writing, or even documented internally by the Respondents (at least in the evidence provided to us). We think it extremely unlikely that the only dates on which the Respondents worked on their application were 24 October and 15 November 2019, and 16 April 2020, but we have simply not been given enough evidence to explain what other endeavours they made and when, and the nature of the technical problem and how it was resolved.
37. Bearing in mind the seriousness of the consequences of not having a licence, we would have expected a substantial flow of letters and emails to NCC, a record of telephone conversations, possibly a complaint letter to NCC, the involvement of an MP or local councillor, and/or reference to the Local Government Ombudsman. We do not understand why at least some of these actions were not taken. The Respondents were under threat of substantial financial penalties and a criminal record, clearly communicated to them on 23 May 2019, and their efforts to apply for a licence prior to 28 April 2020 appear to the tribunal to have been paltry.
38. For these reasons we find that the Respondents had no reasonable excuse for failing to licence the Property by reason of the difficulties they claim they had with the NCC web-site. We find that they were committing an offence under section 95 of the 2004 Act between the dates 2 June 2019 and 27 April 2020, inclusive. This is within the period of 12 months ending

with the date of the application for a rent repayment order, so section 41(2) of the 2016 Act is satisfied.

39. We have found that all the requirements for the making of a rent repayment order are met, so we now consider what order to make. We are bound by *Vadamalayan*. We do not consider that any order we make should be affected by the conduct of either the landlord or the tenant. Neither has behaved in any way which is remarkable, according to the submissions we have read. We have been given no details of the Respondents' financial position apart from being told the Property is mortgaged, which we may not take into account. If a tribunal is to take into account a landlord's financial circumstances, our view is that we would need substantial disclosure of both the capital and income / expenses position. That has not been given to us.
40. We therefore have no real discretion. We make a rent repayment order for the period 2 June 2019 to 27 April 2020 inclusive. Apportionment on a daily basis is complicated by the fact that 2020 was a leap year. Our calculation however is that the sum of £4,340.00 represents the rent paid during that period. We order that that sum be repaid by the Respondents to the Applicant by way of a rent repayment order.

Appeal

41. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)