FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**MAN/00CJ/HMF/2019/0027, 0028, 0033, 0034, 0035, 0036, 0039, 0047 (Flat 2); 0018, 0019, 0020, 0021, 0022, 0029 (Flat 3); and 0025 (Flat 4)**
Properties	:	**Flat 2, Block A, Flat 3 Block A, and Flat 4, City View@Jesmond, Eskdale Terrace, Jesmond, Newcastle upon Tyne, NE2 4DD and 4DY**
Applicants	:	**See List noted below**
Representatives	:	**In person**
Respondent	:	**SSG Property Developments Limited**
Representative	:	**TT Law; Solicitors**
Type of application	:	**Rent Repayment Order - Section 40 Housing and Planning Act 2016**
Tribunal members	:	**Judge L Robson** **Mr I R Harris FRICS**
Date of Determination	:	**19th December 2019**
Date of Decision	:	**15th January 2020**

DECISION

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Decision Summary

1. The Tribunal refused all the applications. It was not satisfied beyond reasonable doubt in accordance with Section 43 of the 2016 Act, that a relevant offence had been committed by the Respondent.

2. The Tribunal made the other detailed decisions noted below.

The Applications

3. By 15 applications dated on various dates between 9th May and 20th May 2019 each of the Applicant tenants applied to the Tribunal under Section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order ("RRO"). The Tribunal gave Directions on 24th and 25th July 2019 requiring both parties to prepare their respective cases and stating that a paper determination would be made unless either party requested a hearing. The Applicants and Respondent sent in their case bundles in compliance with the Directions.

4. All fifteen cases relate to three large flats at the City View@Jesmond development In Eslington Terrace Jesmond, Newcastle upon Tyne NE2 4DD, and 4DY; being Flat 2 Block A, ("Flat 2") Flat 3, Block A ("Flat 3"), and Flat 4 Block A ("Flat 4"). Flat 2 and Flat 4 each comprise eight units, and Flat 7 comprises seven units. Not all potential applicants have applied.

5. The Applicants and case numbers at Flat 2 were:

   Mr M Cooper - 0027; Mr J McGowan - 0028; Mr S Mack - 0033;
   Ms E A Armstrong - 0034; Mr J Tye - 0035; Mr LRA Jackson - 0036;
   Ms J Sharpe - 0039; Ms N Bell - 0047;

6. The Applicants and case numbers at Flat 3 were;

   Mr M Bennett - 0018: Mr H Pearson - 0019; Mr R Watts-Estico - 0020
   Mr P Nowa - 0021, Mr A Grogan - 0022; Mr A Hayton - 0029

7. At Flat 4, the initial application was made in the name of eight applicants, all of whom signed the application. However the names of all but one applicant had been crossed out on the application form. Only Ms J Wilson made a statement of case, and all correspondence from the Tribunal has been addressed only to Ms Wilson. The Tribunal thus considers Ms J Wilson alone to be the Applicant in case 0025. In view of the Tribunal's decision in this case, nothing appears to turn on this point.

8. Initially many of the Applicants were confused as to the identity of the Landlord (although it does appear on the tenancy agreements). The Respondent has confirmed in its statement of case that in fact the Landlord and correct Respondent is SSG Property Developments Limited.

9. The Tribunal has thus amended the names of the relevant parties to take account of the matters noted above.

The Law

10. Sections 40-46 of the 2016 Act contain the provisions in respect of RROs. In summary, Section 40 provides that the Tribunal may make an RRO in favour of a tenant where a landlord has committed a relevant offence - in this instance the offence set out in Section 72(1) of the Housing Act 2004, the control or management of an unlicensed HMO. Section 41(2) stipulates that a tenant may apply for an RRO only if the if the offence relates to housing which at the time of the offence was let to the tenant, and the offence was committed in the period of 12 months ending with the day on which the application was made.

11. Section 43 states that the tribunal may make an RRO if satisfied beyond reasonable doubt that a landlord has committed the offence. The amount of the order is set out in section 44 as a period not exceeding 12 months during which the landlord was committing the offence, (e.g. where the order is made under Section 72(1) of the Housing Act 2004). The amount of an order in favour of a tenant is the rent paid in the period (less the amount of any Universal Credit paid in respect of the rent relating to the property) subject to any exceptional circumstances which the tribunal considers would make it unreasonable for the landlord to pay that amount (set out in Section 44(4)).

Applicants' Cases

12. The cases of all Applicants were very similar. The properties, the leases, the relevant factual matters surrounding the alleged offences, the statements of case, the supporting documentation, and the landlord, were very similar. The Tribunal, for simplicity, has therefore summarised all the statements of case into a single composite statement, which excludes certain matters not deemed to be relevant.

13. While many of the tenancy agreements were signed on different dates, they all granted tenancies for a period of 43 weeks from 3rd September 2018, at rents of £110 per week, payable monthly in advance. On or about 8th May 2019, the Applicants became aware from a conversation with Mr Thomas McFall, Senior Technician - HMO Licensing, at Newcastle City Council, that due to a change in the law taking effect on 1st October 2018, the property became liable to registration as an HMO. Further, the manager had not applied for such a licence until 3rd January 2019. A copy of the relevant licence (in the bundle) showed that the date of the licence was 15th February (Flat 3), 4th February 2019 (Flat 4), and both for a period of 5 years expiring on 3rd January 2024. The Tribunal found no copy of the Licence for Flat 2 in the bundles. Many of the Flat 2 Applicants had mistakenly copied the licence for Flat 4 in their bundles. However, none of the parties have taken that point and so the Tribunal is prepared to accept that a licence for Flat 2 was applied for and granted at about the same time. An email from Mr McFall at the Council (see above) dated 31st July 2019 also suggests that an application for Flat 2 was made in January 2019.

14. The Applicants' statements were inconsistent in some matters of detail, and also relating to the rents they claimed, mainly due to choosing different dates for the start and end dates of their claims. This however is a matter governed by the legislation. Evidence of rents paid during the relevant period was mostly available in the bundles. The Applicants refuted the Landlord's submission (below) that their claims were opportunistic. They had acted on advice from the Council.

Respondent's Case

15. The Respondent's case was supported by a witness statement dated 3rd September 2019, made by one of its Directors, Dr Akash Ghai. Statements of case were provided relating to each Flat. After dealing with the questions relating to the correct identity of the Respondent, noted above, the Respondent submitted that City View had been renovated in 2018, and that the Applicants were some of the first occupiers of their flats. Shortly before the Development was completed, an issue arose with HMRC over the VAT treatment of the conversion works, which related to whether the development remained Halls of Residence, or had been converted into HMOs. Copies of correspondence from HMRC were produced over this issue, dated 11th September 2018 and 25th January 2019. This issue was complex, and depending upon the outcome, it may not have been necessary to apply for an HMO licence. The Council, it was submitted, had been unable to offer guidance on the matter.

16. The Respondent did not materially dispute the Applicants' evidence relating to the date the licensing requirement came into effect, or the dates of application and grant of the current licences. However it drew attention to the following matters:

    a) The Applicants statements did not explain any prejudice caused to them by the alleged breaches. The Respondent considered the applications were generally opportunistic.

    b) The licences were issued for five years without an inspection, or a hearing, and without conditions. This showed the quality of the development.

    c) The Respondent had not been prosecuted by the Council for the late application or any other offence.

    d) The 2004 and 2016 Acts were intended to crack down on "Rogue" landlords. The Respondent offered premium quality accommodation at affordable prices.

17. The Respondent produced evidence in mitigation, of its outgoings on the property in the event of the Tribunal deciding to impose an order. In the Respondent's view the appropriate period of the alleged offence was from 1st October 2018 to 3rd January 2019.

18. Finally the Respondent drew attention to certain emails in the Applicant's bundles relating to correspondence between the Applicants and the Council. The quality of most copies was poor, but the Applicants' general bundle relating to Flat 2, contained legible exchanges between the Applicant Mr Cooper and Mr Thomas McFall in the period 8th May 2018 - 5th August 2018. Of particular note were two emails from Mr McFall, one dated 31st July 2018 (referred to above), and the other dated 5th August 2018.

19. The text of the email dated 31st July 2018 states:
" I have had a really good look into this for you and having reviewed our records, it appears the Management for City View Jesmond did make efforts to submit an application via our application platform at the time required (October 2018). However our IT system did not allow for the transaction to be completed, and subsequently the application did not go through. It wasn't until January, when credit card records were obtained and checked that the Management for the property realised that the payment had not gone through (due to Newcastle IT issues) and they then resubmitted an application.

It is therefore an error on our part (Newcastle City Council) that the application was not processed in time.

And so subsequently I would suggest that City View Jesmond was licensed within an acceptable time and no legal action would have been taken by the Local Authority".

20. On 2nd August 2018 Mr Tye emailed Mr McFall querying the contents and asking for clarification of his email of 31st July. After acknowledging the evidential difficulties of proving commission of an offence, Mr Tye stated:

"However it still stands that we all resided in an unlicensed property for 4 months, and so we would find it helpful if you could send us the following:

i) Evidence that SSG Property Developments attempted to apply for the HMO license in October 2018.

ii) Evidence that the application failed due to a fault with the IT system on your end.

iii) Evidence that the application was then made again in January 2019 and approved."

21. On 5th August 2019 Mr McFall replied with 2 emails. The first email confirmed that applications for all three properties (and others) had been made on 3rd January 2019. The second email stated:

"I have reviewed our IT record of submissions and I can confirm that there is nothing on our records to say that a licence application was attempted for City View Jesmond from end of September 2018 until the actual application was submitted on 3rd January 2019"

22. In his witness statement Dr Ghai commented on these emails as follows: *"The person who would have submitted the application has now left the Respondent so I can't confirm whether what Mr McFall said is true. My belief was that the difficulties in progressing the application were consequent on the stance taken by HMRC rather than being IT related"*.

Determination

23. The Tribunal considered all the evidence and submissions. It noted that all the applications were made in due time. The next matter to be decided was whether there was evidence that a criminal offence had been committed in breach of Section 72(1) of the 2004 Act. As stated in paragraph 4.(i) of the Tribunal's Directions, the Tribunal must be satisfied beyond reasonable doubt (the criminal standard of proof), not on the balance of probabilities (the usual civil standard of proof). Mr McFall's two emails (noted above) appear inconsistent. The email of 31st August 2018 appears to exonerate the Respondent from responsibility for the failed application. On the other hand, his second email of 5th August gives an inconsistent impression, and leaves the question open as to whether an application was made prior to the end of September, or was never made at all. Dr Ghai, who appeared to be a credible witness, stated that he was uncertain as to the accuracy of Mr McFall's statement, although he had been under the impression that the HMRC issue was the dominant factor, rather than IT. Another factor was that the Council had apparently not taken any kind of punitive or enforcement action against the Respondent, as it would normally be expected to do, which suggested that it was not certain that the facts would support a conviction in the Magistrates Court.

24. Having considered all the relevant evidence, the Tribunal concluded that the evidence was equivocal. It decided that it was not satisfied beyond reasonable doubt that any offence had been committed. If the Tribunal was found to be wrong in that matter, then it decided that the Respondent would be entitled to rely on the defences set out in Section 72(5)(a) and/or 72(5)(b) of the Housing Act 2004, in that it had a reasonable excuse for managing an unlicensed house or allowing a person to occupy an unlicensed house

25. The Tribunal decided that it must refuse all the applications. Thus, it was unnecessary to go on to consider the financial evidence.

Mr L Robson
Tribunal Judge
15th January 2020