



**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 D. Barlow
Mr A McMurdo**

**Date and mode of
Hearing** : **28 April 2021
Video hearing on Cloud Video Platform**

Date of decision : **25 June 2021**

DECISION

The Tribunal determines that it shall exercise its discretion to make a rent repayment order in terms that the Respondents shall pay to the Applicant the sum of £4,340.00 within 35 days of the date of this decision.

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REASONS

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 therefore made a paper determination on 23 September 2021.
5. The Respondents sought leave to appeal the decision to the Upper Tribunal challenging the findings of fact made by the FTT and its conclusion that the offence was committed. Prior to 28 April 2020, the Respondents' contend that they had a defence of reasonable excuse. Permission to appeal was given on the sole basis that the FTT's decision might be set aside because it was made on the papers without a hearing.
6. The appeal was considered by the Upper Tribunal under UTLC Case Number LC-2020-23, along with two similar appeals [UT Neutral citation number: [2021] UKUT 0039 (LC)] and for the reasons set out in paragraphs 36-49 of Judge Elizabeth Cooke's Decision dated 17 February 2021, the FTT decision of 23 September 2020 was set aside in its entirety and the case remitted to the FTT for a re-hearing by a new panel.

Facts

7. 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.
8. After a period of being vacant from late 2017 to early 2019, the Property was let to the Applicant through an agent called Countrywide. The Respondents were not aware of the selective licensing designation, and it was not brought their attention by the agents, if in fact the agent was aware of it. 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, 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 the Respondents do not challenge.
9. In around April 2019, the Applicant began to have problems with damp. We have not considered 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. ...”

10. 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.

11. 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.
12. There is no further documentary evidence that relates to licensing until 24 October 2019, when Respondents' 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.
13. 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.
14. 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".
15. On 25 June 2020, NCC issued a Notice to the Respondents of their intention to grant a licence 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 hearing

16. A video hearing took place on 28 April 2021, using Cloud Video Platform (CVP). The Applicant represented himself. The Respondents were represented by Mr Shalim Ahmed.

The Respondents' evidence

17. In their Statement of Case, the Respondents gave an account of their activity in applying for a licence, which Mr Ahmed confirmed in a Supplemental Statement of Case filed on 29 March 2021 and expanded on at the hearing.
18. The Respondents' 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.

19. The Respondents' provided no specific dates or detail of the queries in their statements' other than those referred to in paragraphs 12-14 above. However, Mr Ahmed confirmed in evidence, that when they received the letter dated 23 April 2019, which wrongly referred to them as freeholders, the Respondents' assumed the letter was, in parts, based on a generic form. He was nevertheless very concerned about the letter and immediately addressed what appeared to be the primary point of it, i.e. to arrange for NCC to inspect the property in connection with the tenant's complaint about water ingress. It was only during a follow up call with the NCC toward the end of May 2019, that it became apparent that there was also an urgent need for them to apply for an HMO licence. Mr Ahmed said that they'd understood from the call that the application had to be made on-line. The alternative method of filing a paper application was not discussed and they assumed this was not therefore an option.
20. Mr Ahmed confirmed that the issue with the website occurred over an extended period of time beginning late May early June 2019, when he tried to logon using his work computer. Mr Ahmed said that he managed to download the application form and then delegated completion and return of the form to one of his staff, who was unable to get through the earlier stages of the application to reach the final stage of uploading the form. They contacted NCC by telephone on more than one occasion to resolve the problem.
21. Unfortunately, uploading the completed application remained unresolved until Mr Ahmed was working from home in March/April 2020, due to the national Corona virus lockdown. He was then able to logon using his home computer and devote sufficient time to phone calls with NCC to enable him to complete the application. Mr Ahmed confirmed that from his conversations with NCC, the problem with uploading the application appeared to have been caused by the security settings on his work computer. Mr Ahmed said the Council support staff were very helpful once he finally managed to speak to the correct person, who in April 2019, talked him through the application process leading to the successful application of 28 April 2019.
22. It was put to Mr Ahmed that the alternative possibility of filing a paper application should have been evident to him as the option is clearly set out on the NCC website. Mr Ahmed did not dispute this but said that because he'd understood that an on-line application was required, it didn't register with him at first, and later when he was experiencing continuing problems, he still thought the on-line procedure was likely to be quicker. Mr Ahmed acknowledged that, had he known from the outset that a paper application was possible and how long it was going to take for him to submit a successful online application, he would have opted for the paper application – but that is judging his actions with the benefit of hindsight.
23. Mr Ahmed confirmed that he is the managing director of Sterling Estates Management Limited, a London based company with 19 staff, which predominantly deals with block management of service charges, but also manages about 33 rental properties, all but 3 of which are inside the M25.

He holds a CILEX professional qualification and is an Associate of RICS. When asked why the Respondents had not received notification of NCC's designation of the Property, Mr Ahmed said that the Property was outside their area and they had not therefore picked up the local advertisements, however, they had been in contact with the Council on various non-licensing matters and was disappointed that neither the Council or his agents had picked this up and alerted them to the need to apply for licence. It was a lesson learned and he now checked licensing requirements for all the rental properties six monthly.

24. Mr Ryan asked Mr Ahmed how the Respondents could reasonable believe that the partial applications were "duly made" when every email acknowledgement from the NCC web-site stated clearly that although they has started the application **"The application has not yet been submitted"** and **"Please note that completing and submitting the application should be done in good time. If the property is licensable and remains unlicensed an offence is being committed until a duly made* application is received"**. Duly made being defined at the bottom of every email **"* Duly made refers to all information, supporting document and fee having been submitted and the application accepted as duly made, ready for consideration to issue or refuse a licence."**
25. Mr Ahmed said that because they were clearly engaged with the Council on the process and NCC had not indicated that they intended taking any enforcement action, they assumed that those parts of the emails were a standard warning in a generic letter, which in the absence of any follow up by NCC, indicated to him that NCC were not intending to issue a penalty notice. He acknowledged that, with the benefit of hindsight, the Respondents would have acted differently. Mr Ahmed said that throughout the period of time the Respondents were attempting to submit the application, he believed that they were not committing an offence because they had commenced the process.
26. In relation to the Respondents' intermittent efforts to complete the on-line application Mr Ahmed said that they weren't treating the process as non-urgent, it was an outstanding task that needed to be completed. With hindsight they could have emailed the Council about the problems and possibly should have, but assumed that NCC would have been aware of their engagement with the process. Mr Ahmed said they were aware of the need to submit the application and to his credit acknowledged that his good intentions to sort it out on a given day, had stretched to several days, weeks and even months, and that although it was reasonable to criticize the length of time taken to make the application it had been a frustrating process that was only resolved when he finally managed to speak to someone at the Council who could walk him through it.

Law

27. 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.

28. 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.

...

29. The relevant part of s87 provides:

“Applications for licences

(1)

(2) The application must be made in accordance with such requirements as the authority may specify”

...

30. 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)*).

31. 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).
32. 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.
33. 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 landlord’s 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.
34. 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

35. The first issue for us to determine is whether 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 Respondents have put forward an argument that they have a defence under s95(3)(b) because the partial application submitted repeatedly on the NCC website constituted a ‘duly made’ application.
36. It is clear however from the email responses to the Respondents incomplete applications that, contrary to the Respondents’ belief that engagement in the process was sufficient to establish a defence, the application was not ‘duly made’ ***in accordance with the requirements of the authority*** (s87(2)), until the 28 April 2020; as confirmed in the NCC letter of 25 June 2020, which confirms receipt of the application on 28 April 2020. It is only from that date that the offence was not being committed.
37. From the facts and evidence outlined above, we have determined 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.
38. 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 technical problems with NCC’s website.

a. The period during which the Respondents were unaware of the obligation to licence
39. The Respondents have claimed in their statement of case that NCC had a statutory duty to notify them of the obligation to licence. No authority has been cited in the statements, or put forward by Mr Ahmed at the hearing. We are unaware of any such obligation.
40. 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 accept the Respondents’ evidence that, not being local to Nottingham, they were unaware of the designation and to an extent, relied on their professional agent to carry out such checks when letting. We think it unlikely 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, particularly where they are not local to the area, and do not think it would be in the public interest to prosecute in these circumstances.

41. 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.
42. In the letter of 23 May, NCC gave the Respondents 10 days to make their application. Had the Respondents submitted their application within that period, it is unlikely that 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.
43. 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 technical problems with NCC's website.

44. The Respondents argue that the problems encountered with the NCC website present such an unreasonable obstacle to making an application that the Respondents should be afforded the defence of reasonable excuse, as set out in s95(4)(a).
45. 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.
46. However, it is clear from the Respondents evidence that the issues with NCC's website did not constitute an insurmountable barrier to making an application.
47. We accept the Respondents evidence that that they commenced the process of making an online application as early as the end of May/ beginning of June 2019, despite the absence of any paper evidence documenting the earlier attempts. Mr Ahmed gave a clear account of the steps taken, and appeared to us to be an honest witness, ready to acknowledge where, with hindsight, the Respondents might have acted differently, and his account of the earlier attempts is consistent with the later documented attempts made on 24 October and 15 November 2019. We accept that there were difficulties navigating through the necessary

parts of NCC's website, which were not resolved until Mr Ahmed was able to devote sufficient time to the process in April 2020.

48. However, the technical problems appear to have been caused by difficulties making the application within the Respondents' internet browser due the security settings on the Respondents' work computer and not due to any fault within the NCC's website that caused it to continually crash. Furthermore, once Mr Ahmed resolved to complete the application process, assisted no doubt by the extra time working from home during lockdown afforded him, he was able to do so. We have no doubt that it required some persistence and determination to complete the on-line application and accept that without telephone assistance from the Council, an online application was probably beyond the technical capability of the Respondents. However, the technical assistance was available to the Respondents, if not always immediately accessible and the option to submit a paper application was, as Mr Ahmed acknowledged, also available to the Respondents.
49. Given the seriousness of the consequences of not having a licence, we would have expected the Respondents to have fully, and as a matter of some urgency, explored every avenue available to submit the application. The Respondents were under threat of substantial financial penalties and a criminal record, clearly communicated to them on 23 May 2019, and their assumption that without more, the Council were unlikely to actually pursue these threats, was casual bordering on reckless. Mr Ahmed is a professional managing agent with experience of the regulatory regime under which residential landlords operate and it is not reasonable, armed with such relevant experience, for him to have put the application on the back-burner because the Council were not actively threatening enforcement proceedings.
50. For these reasons we find that the Respondents had no reasonable excuse for failing to licence the Property by reason of the difficulties they experienced with the NCC website. 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.
51. 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 and the evidence put forward at the hearing. The Respondent has not provided any evidence of financial hardship and no evidence of the Respondents financial position was put forward by Mr Ahmed at the hearing.
52. We therefore have little discretion to consider any reduction in the amount that can be ordered. We therefore make a rent repayment order for the

period from 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.

Judge D. Barlow Chair
First-tier Tribunal (Property Chamber)

Date: 25 June 2021

Rights of Appeal

- By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.
- 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 Tribunal at the regional office which has been dealing with the case.
- 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.
- If the application is not made within the 28-day time limit, such application must include a request for 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.
- The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.
- If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).