



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

Case Reference : **BIR/OOCN/HMK/2019/0008 - 12**

Property : **28 Bloomsbury Street, Birmingham, B7 5BS**

Applicants : **Natasha Hobson (1)
Imogen Baker (2)
Teddy Woolgrove (3)
Emily Hopper (4)
Jennifer Robson (5)**

Respondent : **Wenlock Abbey Limited**

Type of Application : **Rent Repayment Order
Housing and Planning Act 2016**

Members of Tribunal : **Judge D Jackson
Mr DA Lavender**

Date of hearing : **3rd May 2019
Centre City Tower Birmingham**

Date of Decision : **22 May 2019**

DECISION

© CROWN COPYRIGHT 2019

Background

1. By application received on 23rd January 2019 the five Applicants applied for a Rent Repayment Order under the Housing and Planning Act 2016.
2. On 4th December 2017 the 2nd – 5th Applicants entered into an Assured Shorthold Tenancy Agreement with the Respondent whereby the Property was let for 12 months from 1st July 2018 until 30th June 2019 at a monthly rental of £2275. The 1st Applicant was added to the Agreement on 15th May 2018.
3. The Property is a two-storey house. Accordingly, the Property became an HMO of a prescribed description for the purpose of section 55(2)(a) of the Housing Act 2004 on 1st October 2008 by virtue of The Licensing of houses in Multiple Occupation (Prescribed Description) (England) Order 2018.
4. The Property therefore became an HMO to be licensed by the local housing authority (Birmingham City Council) on 1st October 2018. An email erroneously dated 1st June 2019 from Heather Glover, Prosecution Officer, HMO Licensing Team confirms that a completed HMO Licence for the Property was received on 30th November 2018.
5. The Applicants apply for a Rent Repayment Order on the basis that there was no HMO Licence in force for the Property between 1st October 2018 and 29th November 2018. The Applicants allege that the Respondent Landlord has therefore committed an offence of control or management of an unlicensed HMO contrary to section 72 (1) of the Housing Act 2004. The Respondent has not been convicted or received a Financial Penalty in respect of the offence.
6. The amount of any Rent Repayment Order must relate to rent paid for the period during which the landlord was committing the offence (section 44(2) of the 2016 Act) and must not exceed the rent paid in respect of that period (section 44(3)(a)). In determining the amount of any Order, the Tribunal must, in particular, take into account the conduct of the landlord and the tenant, the financial circumstances of the Landlord and whether the landlord has been at any time convicted of a relevant offence (section 44(4)). The Tribunal cannot, however, make an additional award for “compensation for time wasted, aggravation and anxiety caused”, return of deposit or damage caused by mould and damp.
7. The Applicants also seek an order for reimbursement of fees totalling £300 under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
8. On 24th January 2019 the Tribunal issued Directions.
9. The Tribunal has considered Statement of Case dated 22nd February 2019 on behalf of the Applicants and Response by the Respondent dated 15th March 2019
10. The Applicants are not content with a paper determination and this application was heard in Birmingham on 3rd May 2019. The Applicants were represented by Natasha Hobson. Mr Fiaz attended as director of the Respondent company together with Mr M Hussain from Property Solutions who are the Respondent’s managing agents.

Inspection

11. The Tribunal inspected the Property on the morning of the hearing.
12. The Property is entered via a small brick built porch with a flat roof. The Applicants explained how that roof leaked and water dripped into the porch making it unsuitable for storage.
13. Downstairs there is a bedroom, lounge, downstairs shower and toilet and a kitchen which has doors leading to the rear garden. The damage to the ceiling in the lounge from the upstairs bathroom had been repaired. The Applicants described the mould

in the downstairs shower room/ toilet caused by water penetration from the external wall and porch roof.

14. Upstairs there are four bedrooms and a bathroom. The Applicants described how there had been mould in all bedrooms. Bedroom 1 at the front and bedroom 2 at the rear were worst affected. The Applicants described mould on the ceiling running for about 1 metre from the external walls. The situation was improved following roofing work carried out in December 2018 to replace felting and cracked tiles. Bedroom 2 at the rear also had mice. Bedroom 3 at the rear was least affected. Bedroom 4 at the front also had mould across the outside wall. The Respondent supplied the Applicants with a dehumidifier and additional heaters.
15. The upstairs bathroom has been refurbished. It has been retiled and the leak from the bath fixed.
16. By the time of the Tribunal's inspection fire doors had been fitted throughout the Property.

Applicants' Case

17. The Applicants allege that the Respondent has committed an offence under section 72(1) of the Housing Act 2004. The offence was committed between 1st October 2018 and 29th November 2019. The Applicants accept that a Licence was applied for on 30th November 2019. The Applicants seek an Order in the sum of £4550 being 2 months' rent. The Applicants have produced bank statements with their application to substantiate the rental payments made by them
18. The Applicants' case is that the Respondent only applied for a Licence after the Applicants sent an email to Mr Mohammed Fiaz (Director Wenlock Abbey Limited) on 16th November 2018 offering to surrender the tenancy and indicating, inter alia, that "we are aware that the house has not been properly licensed as a large HMO with Birmingham City Council".
19. It is the Respondent's case that an application for an HMO Licence was posted on 25th September 2018. Ms Hobson told the Tribunal "whether or not the council lost the application we do not know". However, she submitted that the Respondent had been negligent in failing to chase up its application in the absence of an acknowledgment from the Local Authority. The Respondent acted negligently by failing to take action until it contacted Birmingham City Council Private Rented Sector Department on 27th November 2018 having been prompted to do so by the Applicants' email of 16th November 2018.
20. On moving into the Property, the Applicants noted a number of problems relating to the boiler, insecure gate in the back garden and a smell that was "offensive to the nose".
21. The first major problem was that whilst attempting to change electricity meter from pay as you go to a standard credit meter it appeared that the previous occupier had "hotwired" the meter. This was a very significant safety concern. The problem was rectified by SSE on 26th July 2018.
22. The upstairs bath/shower leaked into the downstairs sitting room through the ceiling mounted fire alarm. Eventually in February 2019 the bath was taken out and reinstalled.
23. There was also a problem with mice. This problem was dealt with by environmental pest control in early November 2018.
24. All of the Applicants are music students at the Birmingham Conservatoire. Four of them are singers or wind players. The extensive mould growth described on inspection caused them all considerable alarm. The problem was finally traced to

deterioration of the felt under the front 1 metre of the roof tiles. There were also some cracked tiles. Roofing repairs were carried out in December 2018. Although this improved the situation mould still remained at the Property until the Applicants left the Property on 12th March 2019. Some of the Applicants' personal property had been affected mould growth. The problem was also alleviated in part by dehumidifiers and extra heaters supplied by the Respondent.

25. Ms Hobson also complains that she was not recorded on the Deposit Protection Certificate (see document 5 to Respondent's Reply). She was only added following her raising the matter on 3rd December 2018 (see document 5A). Repayment of part of the deposit was only made on the day before the hearing and £370 is still withheld pending supply by the Applicants of a utility bill.
26. The Applicants' also point out that since they have vacated the Respondent has installed fire doors throughout and now displays contact details and a copy of the Gas Safety Certificate.
27. Ms Hobson and the Applicants also complain that despite requests they have not been provided with a copy of their Tenancy Agreement signed by the Respondent.
28. The main concern shared by all Applicants was a lack of safety particularly in relation to the problems concerning the electricity supply which was aggravated by the Property being unlicensed. Ms Hobson described how the experience of living at the Property has affected her mental health. She said that within 2 weeks of leaving the Property she had noticed an improvement in her symptoms.

Respondent's Case

29. The Respondent's director Mr Mohammed Fiaz concedes that having been a Landlord for a period in excess of 15 years that he is "fully aware of my statutory requirements to licence and maintain properties and I take these matters extremely seriously".
30. He relies on a Certificate of Posting (ref: GQ249172695GB) at Selly Oak to B2 2JB on 25th September 2019 (document 1 to Respondent's Statement of Case). Mr Fiaz's evidence was that the item posted by him was an HMO Licence application for the Property. He further produces (document 2) a "Track your Item" print showing that item GQ249172695GB was collected from Birmingham Central DO on 26th September 2018.
31. A copy of Birmingham City Council's "Application for a Licence for a House in Multiple Occupation" was produced at the hearing. At page 1 in bold print completed application forms and supporting documents are to be sent "by Royal Mail Signed for or Special Delivery to: Private Rented Services, PO Box 16589 Birmingham B2 2JB".
32. Document 1 is conclusive evidence that an item was sent on 25th September 2019 to B2 2JB. Document 2 is conclusive evidence that item was signed for by A Carson the following day. At the hearing Mr Fiaz told the Tribunal that he posted the HMO application form for the Property personally at Selly Oak Post Office. He included with the application gas safety certificate, plan of the property and cheque for fees due.
33. The Birmingham City Council Form in use from October 2018 indicates at page 2 that "we no longer accept payment by cheque". However, that form was not in use when Mr Fiaz posted the first application in September 2018. Mr Fiaz told us that when he hand delivered the second application on 30th November 2018 he paid by

- BACS but was clear in his evidence that the first application was accompanied by a cheque.
34. Mr Fiaz believes that due to the introduction of the 2018 Regulations Birmingham City Council received a large volume of applications around that time and that his HMO application for the Property was misplaced and not registered on the local authority's system.
 35. Mr Fiaz has considerable experience of the HMO Licensing. From past experience he would expect it to take at least 6-8 weeks for the local authority to even acknowledge receipt of his application. Accordingly, he would not ordinarily chase an application within such a short timescale. Accordingly, he searched for his delivery on Track your Item and having seen that it had been signed for that "put me at ease". He expected that the large volume of anticipated applications in October 2018 following the coming into force of the 2018 Regulations would mean that he would expect to wait for a considerable time for his application to be processed. Indeed, Mr Fiaz told the Tribunal at the hearing that he has still not received a decision on his application submitted on 30th November 2018. A License has not been issued and he has not received any queries or correspondence. He attributes this to pressure of work at the local authority.
 36. Ms Hobson asked Mr Fiaz why shortly after sending the email of 16th November alerting the Respondent to the fact that the Property was an unlicensed HMO an electrician attended at the Property with instructions from the Respondent to measure the 5th bedroom. It appears from Ms Hobson that only the 5th bedroom was measured. Mr Fiaz said that he had already prepared a plan of the Property which he submitted on 25th September with his application. However, he was concerned that the size of the small bedroom was more than 6.51 sq. m and therefore satisfied the room size criteria. He had himself previously measured bedroom 5 but wanted confirmation. He agreed with Ms Hobson that no other bedroom had been measured.
 37. The Respondent has been in business since 2012. Mr Fiaz has been involved in the property business since 2008. The Respondent has 4 properties. Mr Fiaz has a further 6 properties himself. In total Mr Fiaz has between himself and the Respondent 5 licensed HMO's.
 38. The Respondent is currently letting the Property to a single tenant at £450 per month. It lets out an unlicensed HMO at £1400 per month and two licensed HMO's at £3000 per month each. Total income is £7850. Mr Fiaz estimated outgoings and mortgage repayments at £4000 showing a monthly profit of £3000-£4000. He estimated that the Respondent has 15-20% equity in each of its properties.
 39. Mr Hussain of Property Solutions gave evidence in relation to maintenance issues. He said that the estate had a reputation for rats and that the local authority had been involved. He accepted that an independent contractor had been called to the Property to deal with mice. In relation to mould growth Mr Hussain said that a cleaner had been sent in to treat mould growth after the roofing work was completed in December 2018. He said that there was some staining. Repainting took place after the Applicants had vacated. He said that any mould at the Property after the roofing work was carried out was due to the Applicants drying clothes internally. He confirmed that the Respondent had provided dehumidifiers and extra heaters. He described the hot wiring of the electricity as "a huge concern and surprise". He blamed the outgoing tenant.
 40. In relation to Ms Hobson's deposit it was accepted that all other Applicants were included on the Deposit Protection Certificate at document 5 to the Reply. Accordingly, the total deposit was always protected. After receiving email from Ms

Hobson in November 2018 Mr Fiaz sent Deed of Assignment from the original tenant (Miss Alison Ross) to my|deposits who altered the Deposit Protection Certificate on 3rd December 2018 (document 5A). Deposits were returned in part on the day before the hearing. £370 has been retained pending production of a utility bill in relation to a contribution made by the Respondent.

41. Gas Safety Records dated 17th January 2018 and 17th January 2019 are at documents 6 and 6A to the Reply.

Deliberation

42. Section 72(1) of the Housing Act 2004 provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed but is not so licenced. By virtue of section 40(3) of the 2016 Act for the purposes of a rent repayment order application the offence must be committed by a landlord in relation to housing in England let by that landlord
43. Section 72(4) provides that it is a defence at a material time that an application for a licence has been duly made in respect of the house and the application was still effective. Section 72(8)(a) provides that an application is effective at a particular time if the authority has not decided whether to grant a licence in pursuance of the application.
44. Section 72(5) provides that it is a defence if he had a reasonable excuse for having control of or managing the house in the circumstance mentioned in subsection (1).
45. Section 43(1) of the 2016 Act provides that the Tribunal may only make a rent repayment order if satisfied, beyond reasonable doubt, that the landlord has committed an offence (whether or not the landlord has been convicted). The Tribunal must therefore be satisfied to the criminal standard of proof that the Respondent has committed an offence under section 72(1) of the 2004 Act.
46. Where a defence of reasonable excuse is raised it is for the local authority to show that the excuse was not reasonable to the criminal standard of proof (**Westminster City Council v Mavroghenis** [1983] 11 HLR 56 and **Polychronakis v Richards & Jerrom Ltd** [1998] Env LR).
47. Mr Fiaz, director of the Respondent company has been involved with HMO properties for 10 years. He currently has 4 HMO Licences and the Licence for the Property will if granted be his fifth. He is very familiar with the HMO Licensing regime. His clear oral evidence was that he posted his application, cheque, plan and gas safety certificate on 25th September 2018. He told us that he posted the documents personally at Selly Oak Post Office. His evidence is corroborated by certificate of posting. The weight of the letter was 0.121 Kg which is consistent with the approximate weight of an application form and supporting documents.
48. Applicants were directed by the Local Authority to send applications by Royal Mail signed for to B2 2 JB. Mr Fiaz complied with those instructions.
49. Mr Fiaz could be satisfied that his application had been collected from the Royal Mail "Track your Item" Proof of Delivery which showed it was collected on 26th September 2018.
50. Mr Fiaz knew from past experience that issuing the Licence would take some time. There is some limited support for his belief in an email dated 30th November 2018 from HMO Licensing Officer (see document 4 to Response) "We are currently experiencing a large volume of licence applications so this may take a little longer than usual".
51. Following receipt of the Response Ms Hobson has spoken to Heather Glover, Prosecution Officer, HMO Licensing Team, Private Rented Services at Birmingham

City Council. Under section 49 of the 2016 Act the local authority may help a tenant by helping to apply, conducting proceedings or giving advice. The Tribunal notes that no further evidence has been received from either the Local Authority or the Applicants casting any doubt on the documentary evidence as to posting and collection of the application on 25th and 26th September 2019.

52. We find that the Respondent has established the defence of having a reasonable excuse for having control of or managing an HMO under section 72(5). That reasonable excuse is that an application was properly made on 25th September 2018 and collected by the local authority on 26th September. In light of the large volume of applications consequent on the introduction of the 2018 Regulations we find that the Respondent was entitled to expect that it would have to wait a considerable period of time before being advised as to the local authority's decision as to whether or not to grant an HMO Licence.
53. The Tribunal is not therefore satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the 2004 Act.
54. We entirely understand why the Applicants have applied to the Tribunal. It has been conceded by the Respondent during the course of these proceedings that the Property was let at a time when roofing repairs were required. As those repairs were not carried out the Applicants suffered exposure to mould and damp for at least 6 months. There was an unexplainable delay in fixing a leaking bath which caused a leak in the downstairs bathroom. One of the tenants had mice in her room. Most concerningly the electricity metre had been hot-wired by a previous tenant.
55. However, as the application has been unsuccessful we do not order reimbursement of fees under Rule 13 of the Tribunal Procedure Rules.

Decision

56. The application for a Rent Repayment Order under the Housing and Planning Act 2016 is refused.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission.