FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HMF/2019/0032**
Property	**:**	**13 Mentmore Terrace, London E8 3PN**
Applicant	**:**	**Matthew Grogan**
Respondent	**:**	**Jill Davey**
Representative	**:**	**Monro Wright & Wasbrough LLP** **Ms Whiting, counsel**
Type of Application	**:**	**Rent Repayment Order**
Tribunal	**:**	**Judge Nicol** **Mr C Gowman MCIEH**
Date and Venue of Hearing	**:**	**14th November 2019;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**14th November 2019**

DECISION

The Tribunal has determined that the application for a rent repayment order should be dismissed.

The relevant provisions in the Housing Act 2004 and the Housing and Planning Act 2016 are set out in an Appendix to this decision.

Reasons

1. On 3rd November 2017 the Respondent granted a tenancy of the subject property at 13 Mentmore Terrace, London E8 3PN to three people, including the Applicant, for a term of 18 months. The Applicant's share of the rent was £950 per month.

2. From 1st October 2018 landlords such as the Respondent were required to obtain a licence for a house in multiple occupation ("HMO") in the area of the London Borough of Hackney such as the subject property. In fact, the Respondent did not obtain a licence until September 2019. The Applicant has asserted that the Respondent thereby committed an offence under section 72(1) of the Housing Act 2004 of controlling or managing an unlicensed HMO. On that basis, under section 41(1) of the Housing and Planning Act 2016, he sought a rent repayment order for the period from 1st October 2018 until he left at the end of the fixed term on 2nd May 2019. He calculated the value of such an order as £6,650.

3. The Respondent admitted the elements of the offence in section 72(1) but sought to rely on the defences at subsections (4) and (5). The Respondent asserted that, at the material time:

   (a) In accordance with section 62(1), on 26th February 2019 she notified Hackney of her intention to take particular steps with a view to securing that the property was no longer required to be licensed.

   (b) She had applied for an HMO licence as early as 3rd October 2018.

4. Alternatively, she argued that, if her circumstances did not fall within the above two situations, her attempts to do so constituted a reasonable excuse for having control of or managing the unlicensed property.

5. The Respondent said that her managing agents, Blake Stanley, informed her of the need to obtain a licence on 3rd October 2018. She went onto Hackney's website and sought to apply for a licence. On 27th November 2019 Hackney emailed her to acknowledge that she had set up a Hackney One account. When she went further, though, the address of the property could not be found. The Respondent immediately emailed Hackney and they responded on the same day that they had referred the problem to their technical team.

6. The Respondent chased Hackney on 7th January 2019 but they responded that the address was still missing but they would contact her directly once it had been added to their system. She chased again at the end of January but it was not until 5th April 2019 that Hackney emailed her to say that the address had been added to their system and she could now log into her account and apply for a licence. On 18th April 2019, Hackney acknowledged receipt of her application.

7. In the Tribunal's view, it cannot be said that an application for a licence had been duly made until 18th April 2019 and so the defence in section 72(4)(a) cannot apply before that date. However, the Tribunal is also satisfied that, until 5th April 2019, the Respondent could not possibly have made an application due to matters outside her control, namely that Hackney's database was defective in not having her property in the system. This constitutes a reasonable excuse within the meaning of section 72(5).

8. The Applicant pointed out that the Respondent could have done more to chase Hackney about the situation, and the Tribunal agrees that she could have done more than send just 3 emails in nearly 4 months, but there is no evidence that this would have achieved the desired result any earlier. Hackney appear to have resolved the problem in their own good time and the Tribunal is satisfied that further action by the Respondent in this case would most likely have been futile.

9. The Applicant referred to an email dated 28th January 2019 from the Respondent in which she appeared to say that she first tried to register her property as an HMO in November 2018, leaving her in breach of the licensing requirements for at least one month. However, the email actually said she tried to register *and* pay the licence fee in November – this is consistent with the fact that she was not told her Hackney One account, through which she would have paid the fee, had been set up until 27th November 2018. The email does not contradict her case that she tried to commence the application process in early October.

10. However, the Applicant further pointed out that, on 26th February 2019, the Respondent emailed Hackney to say,

> I have been trying to register my property as an HMO but my address hasn't been on the system. This was being looked at. However, the rental lease on my property is up for renewal and only two of my tenants are staying. They have said that they do not want to share with another person. This means my property is no longer an HMO and I no longer require an HMO licence.

11. It was this email which the Respondent claimed constitute a notification under section 62(1). The Tribunal is not satisfied that it was sufficient for these purposes. Such notification is preliminary to consideration by the local authority of whether to grant a temporary exemption notice ("TEN"), exempting a landlord from the licensing requirements temporarily while steps are taken to ensure the property no longer needs to be licensed. Hackney apparently required their own application form to be completed when a landlord wants a TEN. There is no evidence of any consideration of either such a form or of a TEN itself. Again, to the extent that it is relevant, the question is instead whether the Respondent has a reasonable excuse in these circumstances.

12. The Applicant sought to rely on the Respondent's email to demonstrate that she no longer sought a licence from that date, thereby excluding the defence under section 72(4)(b). The Applicant pointed out that, in fact, there was never a time when the property ceased to be an HMO. At some point between 26th February and 2nd May 2019 the Respondent changed her mind and decided to continue having three tenants rather than only two. When the Applicant left, he was immediately replaced. Therefore, there was never a time when the property did not need to be licensed and nor was there a time in which a TEN was either under consideration or granted. The Applicant therefore argued that, if the Respondent was not committing an offence for the previous period, she

was at least doing so from 26th February to 18th April 2019, for which a rent repayment order should be made.

13. However, in the Tribunal's view, the Respondent continued to have a reasonable excuse for this period. The fact that for a few weeks, at most, she flirted with reducing the number of tenants does not alter the fact that she was not able to make a licence application. She proactively thought about an alternative solution but changed her mind back fairly soon after. The Tribunal is satisfied that, although short-lived, her intention to reduce the number of tenants was genuine so that she also genuinely believed she would soon not need a licence.

14. Having said that, the Tribunal can see an argument that the Respondent may not have had a valid defence under section 72(5) for at least part of the period from 26th February to 18th April 2019. For reasons already stated, the Tribunal is not of the view that this argument is correct but, if it were, the Tribunal would be minded to exercise its discretion in the aforementioned circumstances of this case not to award a rent repayment order. The existence of that discretion was confirmed by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301.

15. For these reasons, the Tribunal is satisfied that the Respondent has a defence to the claim that she committed an offence under section 72 of the Housing Act 2004 which means that there is no basis on which to make a rent repayment order.

16. The Applicant sought reimbursement of his application and hearing fees but, given the outcome, the Tribunal sees no basis for ordering this.

17. The Respondent's solicitors had threatened the Applicant in correspondence with a costs application under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and submitted a costs schedule by letter dated 11th November 2019. At the hearing, Ms Whiting, the Respondent's counsel, said she would reserve her position until after seeing these reasons. At present, the Tribunal sees no basis for such an order – it would be for the Respondent to apply with arguments which would persuade the Tribunal otherwise.

Name: NK Nicol **Date:** 14th November 2019

Appendix of relevant legislation

Housing Act 2004

Section 72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) 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 67(5), and

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

(4) 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

(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 subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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 permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (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 have 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 subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to *"an offence to which this Chapter applies"* is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	Act	section	general description of offence
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if—

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

…