FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/HMF/2019/0013**
Property	**:**	**18, Denmark Road, Rusholme, Manchester M15 6FG**
Applicant	**:**	**Ms E Sumner**
Respondent	**:**	**Mr & Mrs Rowan**
Representative	**:**	**Philip James Partnership**
Type of Application	**:**	**Housing and Planning Act 2016 – Section 41(1)**
Tribunal Members	**:**	**Tribunal Judge C Wood** **Mr J Faulkner**
Date of Decision	**:**	**23 March 2020**

DECISION

Decision

1. The Tribunal orders that it has no power to make a rent repayment order under section 41(1) of the Housing and Planning Act 2016, ("the 2016 Act"), as the Tribunal was not satisfied, beyond reasonable doubt, that the Respondent had committed an offence under section 72 (1) of the Housing Act 2004, ("the 2004 Act"), in respect of the Property.

Background

2.1 By an application dated 12 May 2019, ("the Application"), the Applicant applied to the Tribunal for a rent repayment order pursuant to section 41 of the 2016 Act.

2.2 Pursuant to the Directions dated 28 August 2019, both parties made written submissions in advance of the hearing which was scheduled for Friday 6 March 2020 at 13:00.

The Law

3.1 The provisions of the 2016 Act, so far as relevant, are as follows –

3.1.1 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 …

(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
5	Housing Act 2004	Section 72(1)	Control or management of unlicensed HMO

3.1.2 Section 41 provides –

(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. …

3.1.3 Section 43 provides -

(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); …

3.1.4 Section 44 provides-
(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 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.

4. The relevant provisions of Section 72 of the 2004 Act provide as follows:

4.1 (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)…
(3)…

4.2 (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)...

(6)...

(7)...

4.3 (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 ....

The Hearing

5. The Applicant attended the hearing in person.

6. Mr. J. Rowan, the Respondent attended in person, together with Ms L Wick and Mr. D. Smith of Philip James Partnership, ("PJP").

7. The Applicant's oral submissions are summarised as follows:

7.1 she was persuaded to search the Manchester City Council website to see if there was a licence for the Property because, throughout the tenancy, Philip James had frequently been unresponsive to tenants' complaints;

7.2 as at the date of the website search, (30 April 2019), the Applicant was unable to identify a licence for the Property;

7.3 an HMO inspection of the Property was undertaken by the Council on 23 May 2019. (In her written statement, the Applicant referred to a visit by a maintenance man on 22 May 2019 to fix a number of matters including the installation of a carbon monoxide detector in the kitchen.);

7.4 the Applicant was advised that a licence application had been submitted by the Respondent on 7 November 2018;

7.5 the Applicant understood that the Council should have undertaken an inspection within 60 days of the licence application, and submitted that it was the Respondent's duty to "chase them up" to ensure that this happened;

7.6 in her view, the Property would have failed an inspection on 8 November 2018 because of the absence of a carbon monoxide detector. The Applicant considered that the absence of this detector would be a breach of conditions 2i, 3i and 6i of the licence dated 2 December 2013, ("the Existing Licence").

8. The Respondent's oral submissions are summarised as follows:

8.1 the Respondent is a good landlord and PJP are a good management agency;

8.2 there was a licence in existence at the commencement of the Applicant's tenancy, in the name of the Respondent's mother, which expired on 1 December 2018;

8.3 an application for a new licence in the Respondent's name was made on 7 November 2018, well before the expiry of the existing licence;

8.4 the Tribunal was referred to the email dated 17 June 2019 from David McAllister from the Council's Housing Compliance and Enforcement Team in which he confirms that:

(1) an application for a licence was received from the Respondent on 7 November 2018;

(2) "…under the terms and conditions of the Housing Act 2004 that from that date 7th November 2018 you had an "effective application" with Manchester City Council and were covered legally to operate a Mandatory HMO until such time as the licence is granted or the City Council serve notice to refuse you a licence…";

8.5 a new licence, ("the New Licence"), in his name was granted effective from 3 September 2019;

8.6 with regard to the carbon monoxide detector, the Respondent stated that there was no requirement in the previous licence for a carbon monoxide detector because there was no "solid fuel burning combustion appliance" at the Property. (It was noted that whilst there was an express reference in the new licence for a carbon monoxide detector this was similarly qualified.) The Respondent insisted that there had, in fact, been such a detector at the Property which he believed had been removed during the course of the tenancy, presumably by one of the tenants. In this respect, the Respondent referred to the email exchange between himself and PJP regarding this;

8.7 Ms Wick explained that the long delay between the submission of the licence application in November 2018 and the Council's inspection was understood to be because of a change to the statutory definition of an HMO which had resulted in a significant increase in the number of licence applications.

9. The Tribunal Judge requested the parties to make submissions on the significance of Mr. McAllister's statement in the email of 17 June 2019 that there was an "effective application" with particular reference to sections 72 (4) and 72 (8) of the 2004 Act.

10. In response the Applicant stated as follows:

10.1 the Application was only made because the Applicant could not identify a valid licence for the Property as at 30 April 2019;

10.2 the failures by the Respondent to install a carbon monoxide detector and to chase up the licence application were sufficient to render the Respondent guilty of an offence.

11. In response the Respondent stated that, having made an application on 7 November 2018 under section 63 of the Housing Act 2004, which ultimately resulted in the issue of the New Licence, and was therefore, "effective" as defined in section 72(8), there was a defence under section 72 (4) to the commission of an offence under section 72(1) that he is a person having control of or managing an HMO which is required to be licensed under Part 2 of the 2004 Act but is not so licensed.

Tribunal's Determinations

12. The Tribunal was satisfied that the Respondent had a defence under section 72(4) of the Housing Act 2004 to the commission of an offence under section 72(1). Specifically:

12.1 the Tribunal was satisfied that the Respondent had made an application for a new licence on 7 November 2018, before the expiry of the Existing Licence on 1 December 2018;

12.2 the Tribunal accepted that this application was "effective" (as that term is defined in section 72(8)(a) of the 2004 Act) during the relevant period of the Applicant's tenancy ie from the expiry of the existing licence on 1 December 2018 until the end of the tenancy (30 June 2019);

12.3 the Tribunal was satisfied that there was no legal requirement for the Respondent to install a carbon monoxide detector at the Property, and that the lack of a carbon monoxide detector did not constitute a relevant offence;

12.4 the Tribunal was satisfied that the Respondent did not contribute to the delay between the making of the application for a new licence on 7 November 2018 and the grant of the New Licence.

13. In view of its findings in paragraph 12, the Tribunal determined that it was not satisfied, beyond reasonable doubt, that the Respondent had committed an offence under section 72 of the 2004 Act, as required under section 43(1) of the 2016 Act, and it therefore did not have the power to make a rent repayment order in respect of the Property.

Judge C Wood

23 March 2020