FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HB/HMF/2019/0013
Property	**:**	8 Tyndalls Park Mews, Bristol BS2 8DN
Applicants	**:**	(1) Lewis Isbell (2) Xenia Dautzenberg (3) Arriyan Wells (4) Charlotte Whitham (5) Miles Ellis and (6) Oscar Cremmen
Representative	**:**	Mr A Maclenahan, of Justice for Tenants
Respondent	**:**	Luke Aikman
Type of Application	**:**	Rent Repayment Order: s.41 Housing and Planning Act 2016
Tribunal Members	**:**	Judge M Loveday Mr D Banfield FRICS
Date of hearing/venue	**:**	2 March 2020, London Region Tribunal Centre, 10 Alfred Place, London WC1E 7LR
Date of decision	**:**	23 March 2020

DECISION

Introduction

1. This is an application for a Rent Repayment Order under s.41 Housing and Planning Act 2016 ("the 2016 Act"). The matter relates to a tenancy of a property at 8 Tyndalls Park Mews, Bristol BS2 8DN. The Applicants are former occupiers, and the Respondent is the landlord.

The offence

2. Section 40(3) of the 2016 Act provides that Chapter 4 applies to certain offences "*committed by a landlord in relation to housing in England let by the landlord*". These include an offence under section 72(1) of the Housing Act 2004 in relation to the control or management of an unlicensed HMO.

3. Section 41 of the 2016 Act provides that:

> "*(1) A tenant … 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.*"

4. Section 42 of the 2016 Act provides that:

> "*(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).*"

5. Part 2 of the Housing Act 2004 ("the 2004 Act") provides for the licensing of HMOs. Section 72(1) of the 2004 Act sets out the relevant offence:

> *"(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.*
> *…"*

6. The remaining provisions of s.72 provide two material statutory defences. First, by s.72(4), it provides that:

> *"(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—*
> *(a) …*
> *(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)).*
>
> *…*
> *(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 …"

7. This defence must be read together with s.63, which provides:

> ***"63 Applications for licences***
> *(1) An application for a licence must be made to the local housing authority.*
> *(2) The application must be made in accordance with such requirements as the authority may specify.*
> *(3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority.*
> *(4) The power of the authority to specify requirements under this section is subject to any regulations made under subsection (5).*
> *…"*

8. Secondly, under s.72(5) there is the familiar defence of "reasonable excuse":

> *"(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*
> *…"*

The Application and preliminary issues

9. The premises comprise a 3-storey townhouse with 7 bedrooms, with cooking, washing and bathroom facilities shared between the occupants. The Tribunal did not inspect them, but some information is provided in the hearing bundle.

10. The Applicants are a number of former tenants of the property under an undated tenancy agreement made in March/April 2018. The Respondent is the landlord. A copy of the tenancy agreement was provided, by which it granted a term of 12 months from 1 July 2018 to 28 June 2019 at a monthly rent of £3,500.

11. The Application to the Tribunal for a Rent Repayment Order was made on 23 October 2019. Directions were given on 6 and 19 November 2019 and both sides filed bundles containing statements of case and the evidence they relied upon. The Applicant then filed a supplemental bundle, which (for the reasons explained below) modified the Applicant's case. A hearing took place on 2 March 2020 at the London Regional Hearing Centre, where the Applicants were represented by Mr Alasdair Maclenahan (of Justice for Tenants) and the Respondent appeared in person.

12. At the start of the hearing, the Tribunal identified a number of areas of agreement. These included:
    a. The premises were an HMO;

b. They were required to be licensed under Part 2 of the 2004 Act; and
c. At all material times the Respondent was a person having control of or managing the premises.

The parties further confirmed they should be able to agree the maximum amount which the Respondent should have to repay for the purposes of s.44(3) of the 2016 Act. But for the reasons given below, it was unnecessary to pursue this.

13. The Tribunal further identified a number of issues in dispute:
    a. Whether the premises were at all material times "licenced" under s.72(1) of the 2004 Act. This also involved the subsidiary issue about whether the statutory defence in s.72(4) applied;
    b. Whether the "reasonable excuse" defence in s.72(5) applied;
    c. The amount of any rent repayment order, including a consideration of the factors listed in s.44(4) of the 2016 Act.

14. It was clear enough at the start of the hearing that the principle issue was whether or not the premises were licenced and/or whether the defence in s.72(4) applied. It was agreed it would be fair and just for the Tribunal to dispose of these questions as a preliminary issue under Rule 6(3)(g) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

15. After hearing submissions and evidence, the Tribunal gave an oral decision under Rule 36(1) of the 2013 Procedure Rules. The Tribunal indicated that it was not satisfied the Respondent was a person who was unlicensed for the purposes of Part 2 of the Act. It followed that the application was not made out. These are the written reasons for the Tribunal's rule 6(3)(g) decision.

The Applicants' case

16. The Applicants set out their case in their two bundles and Mr Maclenahan developed these arguments at the hearing.

17. The initial position adopted by the Applicants was that the premises did not have an HMO licence at any material time. This position was based on two emails from officers at Bristol City Council. The first email is dated 4 October 2019 and came from Emma Tregale, a senior Environmental Housing Officer employed by the Private Housing and Accessible Homes Team. This stated that "looking at our records I can confirm that a licence application was submitted for the above address on 23 October 2018". The second email is dated 23 July 2019 and came from Ms Becky Gale, a Private Housing Officer. This stated that "The property had a licence from 28/08/13 to 28/03/18…".

18. Once the application was issued, the Respondent suggested the information provided by the City Council was wrong. The Applicants' representatives therefor contacted Bristol City Council again. The Council provided a witness statement from Ms Tregale dated 6 February 2020,

which was described as a statement under Rule 16.2 of the Criminal Procedure Rules 2015 and s.9 Criminal Justice Act 1967. Ms Tregale stated that, having looked at the Council's records, she:

> "found that 8 Tyndalls Park Mews had an HMO licence granted on 28th August 2013 which was valid for a period of 5 years from that date".

She also stated that:

> "an online application for a HMO licence renewal was received on 23rd October 2018 with reference to 8 Tyndalls Park Mews. The licence application was submitted by Mr. Luke Aikman. Payment of fees was not required to be submitted with licence application at this time".

19. At the start of the hearing, Mr Maclenahan accepted Ms Gale's email of 23 July 2019 was wrong, and that there was a licence in place up to 28 August 2018. He further accepted that (by virtue of s.72(4) of the Act), that there was deemed to be a licence in force from 23 October 2018. The preliminary issue was therefore limited to the question whether the premises had an HMO licence in place between 29 August and 22 October 2018, a period of about 8 weeks. Mr Maclenahan further accepted that whether there was a licence in place (i) was a question of fact, (ii) that the burden lay on the Applicants to show there was no licence (or deemed licence) in place during that period, and (iii) the Tribunal had to be satisfied beyond reasonable doubt that there was no such licence in place throughout that period.

20. On this question of fact, the Applicants' case was that the Respondent did not make any application for an HMO licence until 23 October 2018. He relied solely on the evidence of Ms Tregale set out above. Mr Maclenahan accepted that less weight might be attached to this evidence, given that she did not attend for cross-examination. But Mr Maclenahan relied on the fact the witness was a local authority officer and that the statement was in the form of a "s.9 statement" used in the criminal courts, and he submitted it should have added weight. Mr Maclenahan also made submissions about the lack of documentary evidence provided by the Respondent, and in particular the lack of any copy of the application for an HMO purportedly made in 2018. When asked by the Tribunal why the Applicants had not obtained documentary evidence to support Ms Tregale's statement, Mr Maclenahan explained that local housing authorities had refused to provide documents to his organisation on at least 20 occasions in the past.

21. In closing, Mr Maclenahan raised two further points. First, even if there was evidence that Mr Aikman had applied for a renewal of the HMO licence before the old one expired, it was plain enough that the Council did not treat that application as valid. In s.72(4), the "application" had to mean the application which was eventually granted. It cannot have been intended that an application which was invalid or which eventually

failed, was "duly made": see s.72(8). The unambiguous evidence of the Council was that the application which gave rise to the renewal was made on 23 October 2018. Secondly, he commented on Mr Aikman's credibility. Mr Aikman said he was a well-organised person, with extensive experience of IT matters. But he had not been able to produce a copy of the alleged renewal application, any emails etc. acknowledging receipt or even the report of the alleged inspection on 11 October 2018.

The Respondent's case

22. Mr Aikman's case was that as a matter of law, an application for an HMO licence is "duly made" under s.72(4)(b) when the application complies with s.63. There was no evidence Bristol City Council had ever specified any "requirements" about the way applications should be made. All that was known was that the Council did not require a fee to be paid at the same time an HMO licence was applied for: see Ms Tregale's statement.

23. It was argued that on the evidence, the deeming provision applied, because an application for renewal of the HMO licence had been duly made before 23 October 2018. For the same reason, Mr Aikman had a reasonable excuse for not having an HMO licence under s.72(5)(a) of the 2004 Act, because he reasonably believed a renewal application had been made in time.

24. In his evidence, Mr Aikman suggested he could not remember how or when the renewal application had originally been made. But he believed it was made before expiry of the previous HMO licence for the property. He relied on an email from Mr Michael Duffy, and Environmental Health Officer, dated 18 July 2018, headed "**HMO Visit – 8 Tyndalls Park Mews**". This stated:

> *"Dear Mr Aikman,*
>
> *I contact you with regards the apartment in the HMO license application form that we have recently received. thank you [sic] for making the application ahead of expiry.*
>
> *I would like to arrange an appointment to view the property for the HMO Licence for a time that is convenient to you. The visit will require access to all rooms but should not take longer than 20-30 minutes to complete. If possible, could we arrange for the week commencing 30th July, perhaps the Monday or Tuesday?*
>
> *On another matter, our department has been made aware of a complaint concerning the overgrown tree to the rear garden of the property and in particular, the Wisteria which is apparently now growing up and onto the roof of the property. I wondered if you were aware of this issue and if any action was required / was being arranged?"*

Mr Aikman produced a diary entry to show that the Council inspected on 11 October 2018 between 1.00pm and 4.30pm. On 27 December 2018, the Council had granted the new HMO, and he produced a copy of the decision letter which recorded that the Council had received the application on 23 October 2018. Plainly, the Council would not have (i) provided the email and (ii) inspected, unless there was a proper renewal application in hand.

25. When cross-examined, Mr Aikman suggested it was "going back a long time" and that he didn't remember personally making the renewal application, whether online or offline. He couldn't help with the date it was made. He had no record of making the application – and he would not tell a "fairy tale" suggesting he could remember doing so. When questioned by the Tribunal, Mr Aikman stated he had a better recollection of the events in October 2018. He accepted he had made a duplicate application at that time, and had an email receipt from the Council dated 23 October 2018. He had spoken to Mr Duffy at the time, and had asked why he had to make a "repeat" application. Mr Duffy explained that the Council could not find a copy of the renewal application.

Conclusions

26. The Tribunal does not consider any questions of law really arise. It has already recorded above the parties' acceptance that the preliminary issue essentially raises questions of fact, which the Applicants must prove beyond reasonable doubt. The only possible gloss on this is the argument by the Applicants in closing, namely that for s.72(4) to be engaged, the application for an HMO must be an application which eventually results in the grant of a licence. The Tribunal accepts this argument, but on the specific facts of this case, does not consider it makes any difference. The Respondent's argument is that there was only ever one application to renew the HMO, with a "copy" of the original application being provided to the Council on 23 October 2018.

27. In this instance, the burden of proving the offence in s.72(1) lies on the Applicants, who must prove the offence beyond reasonable doubt. The burden of proving the defences in s.72(4) and (5) lies on the Respondent, who must establish them on the balance of probabilities.

28. There is no dispute the elements of s.72(1) are made out and that the preliminary issues relate to the statutory defences. Considering the evidence about these defences, the Tribunal takes into account the comments made by Mr Maclenahan about Mr Aikman's evidence. It is surprising that Mr Aikman cannot remember making the renewal application, that he cannot remember whether the application was in writing or online, and that he obtained no receipt. As far as the evidence from Ms Tregale is concerned, the Tribunal does not ignore it, since it is given by a Council Officer in the form of a s.9 statement. But the Tribunal cannot consider Ms Tregale's statement to be determinative of the date of the renewal application. As the Applicants accepted, by the date of the statement, the Council had already made one significant error about the dates

the HMO licences were in place for the property, and Ms Tregale did not give evidence to the Tribunal in person so these concerns could be addressed.

29. However, ultimately, the Tribunal considers the email from Mr Duffy and the diary entry for the inspection to be persuasive. The former is headed "HMO Visit – 8 Tyndalls Park Mews", and it mentions an "HMO application form that we have recently received … ahead of expiry". The Applicants were unable to undermine Mr Aikman's evidence in relation to the email and the diary entry. On the balance of probabilities, the Tribunal finds that an application was made to the City Council for a new HMO Licence at some stage before 18 July 2018.

30. It follows the Tribunal finds the Respondent has discharged the burden of proving an application was duly made and the defence in s.72(4) is made out. For the same reason, the Respondent had a reasonable excuse for not having an HMO licence under s.72(5)(a) of the 2004 Act, because he reasonably believed a renewal application had been made.

31. The application for a Rent Repayment Order is therefore dismissed.

Judge Mark Loveday
23 March 2020

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.