



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

Case Reference : **BIR/00FY/HMK/2022/0012**

**HMCTS code
(paper, video,
audio)** : **Remote Video Hearing**

Property : **356 Highbury Road, Nottingham, NG6
9AF**

Applicant : **Mr Naheem Akhtar**

Representative : **Mr Mukulu, Counsel**

Respondent : **Housing 35 Plus Limited**

Representative : **Mr Jonathan Manning, Counsel**

**Type of
Application** : **Application for Rent Repayment Order
by a Tenant under section 41(1) of
Chapter 4 of Part 2 of the Housing and
Planning Act 2016**

Tribunal Members : **Judge C Payne
Mr R Chumley-Roberts MCIEH, J.P**

Date of Hearing : **15 July 2022**

Date of Decision : **15 November 2022**

DECISION

Decision of the Tribunal

1. The Application is dismissed. The Respondent has not committed an offence under section 95(1) of the 2004 Act, being subject to the exemption under Schedule 14, paragraph 2B of the Housing Act 2004.

Introduction

1. The Applicant has applied for a rent repayment order against the Respondent under section 41 of Chapter 4 of Part 2 of the Housing and Planning Act 2016 (“**the 2016 Act**”).
2. The Applicant claims that the Respondent was controlling and/or managing a house which was required under Part 2 of the Housing Act 2004 (“**the 2004 Act**”) to be licensed at a time when it was let to the Applicant but was not so licensed and that it was therefore committing an offence under section 72(1) of the 2004 Act.
3. The Applicant’s claim is for repayment of rent paid during the period from 24 June 2021 to 6 February 2022 in the amount of £1,500.00 or for such period as the Property has been unlicensed.
4. The Respondent claimed no licence was required as they are a co-operative society and exempt from the requirement to be licenced under paragraph 2B of Schedule 14 of the 2004 Act. In the alternative, they submitted that the genuine belief that they were exempt from the need to obtain a licence was a reasonable excuse for having not obtained a licence.

Parties Submissions

5. The Applicant is an IT Consultant, and the Respondent is a registered co-operative housing association as defined by Section 5(2) of the Housing Act 1985. A copy of the Respondent’s registration documents was provided to the Tribunal. The Respondent provides housing to those over the age of 35 who are homeless and may struggle to secure private rented accommodation.
6. In June 2022, the Applicant asked the Respondent to provide him with a room in shared accommodation. At that time, he was not working and had no permanent residence.
7. On 24 June 2022, the Applicant signed a ‘*Members Agreement to Occupy Premises*’ (“**Licence Agreement**”) in respect of 356 Highbury Road, Nottingham (“**the Property**”). The Licence Agreement, which was provided to the Tribunal, is a 10-page document. The Applicant’s

signature appears on 10 occasions on the document confirming he understands the terms upon which he was being made a member and granted a licence to occupy the room being assigned to him at the Property. He has also initialled the document on each page next to '*Member Initials:*' to confirm he has read and agreed to each page. There is also a document entitled *Member Rules* which states in the first line that ... 1. *The Member understands that they have a responsibility to attend any meetings set by the Chair.* 2. *The Member understands the membership fee is included...* followed by a number of other rules. This was also signed by the Applicant and countersigned by a member of the co-operative society's staff to confirm they had been through the Rules with the Applicant. at 17.26 on 24 June 2022.

8. The Applicant confirmed he signed and initialled the documents but advised the Tribunal that he failed to read the documents when signing it or to review the copy subsequently provided to him. He recalls being told some information by the Respondent's staff member but could not recall what he was told as he was focussed on getting the key to the room and the staff member took time going back and forth to her office while sorting the paperwork and room allocation out for him. He confirmed that he had been given the opportunity to read the documents but had chosen not to do so. The Applicant confirmed he was given copies of the documents, which he could have then read at a later date. He chose not to do so.
9. The Respondent submitted that when the Applicant signed the Licence Agreement, he was told that the Licence Fee was £400 per month. Housing Benefit would pay £350, and he would be responsible for the shortfall. The Respondent's staff member assisted the Applicant with logging on to his Universal Credit account and submitting a request for the Housing Benefit to be allocated towards the cost of his room. The Applicant recalled giving his login details and Housing Benefit payments were subsequently made directly to the Respondent against the Licence Fee. The Applicant would also have been aware of the Licence Fee from the copy of the Licence Agreement he had signed and the sums he was being given in Benefits from his account.
10. The Respondent stated that the Applicant was also told that the members hold meetings, which he could attend. The Applicant did not recall being told this information. He advised the Tribunal that the meeting had taken a long time and his only concern during that meeting at the Respondent's office was to get the key to enable him to get into the room being assigned to him. No evidence was submitted from the Respondent's staff member who conducted the sign-up meeting.
11. On the evidence provided, the Tribunal determined that the Applicant knew or ought to have known that the Respondent was a co-operative society of which he was a member and that the society held meetings.

12. In July 2021 the Applicant failed to pay the Licence Fee. When contacted, he advised the Respondent that he had received his housing allowance under Universal Credit but had spent it. He was offered a payment plan but failed to make any payments. From July 2021 to January 2022 Housing Benefit payments for the Applicant were paid directly to the Respondent, leaving the Applicant responsible for paying the monthly shortfall in the Licence Fee of approximately £50 per month as well as the initial month's Licence Fee. The Applicant did not make any payments towards the accruing arrears.
13. The Respondent told the Tribunal that letters and notices regarding the increasing arrears were posted under the door of the Applicant's room, which is the first form of service referred to in clause 41 of the Licence Agreement. Copies of some letters relating to the arrears and the Notice to Quit dated 31 August 2021 were provided to the Tribunal. The Applicant did not respond to the letters or the Notice to Quit. Having received no response, possession proceedings were issued. The Applicant wrote to the Court to say he could not attend the hearing in January 2022, but otherwise did not engage with the proceedings. The hearing took place on 10 January 2022 and a possession order was issued requiring the Applicant to vacate the property and to pay £948.33 in respect of arrears and £355 of the Respondent's costs.
14. Following receipt of the Order for Possession, the Applicant contacted the Respondent and paid £1,500, being full settlement of the Judgement and £197.67 toward future Licence Fees. The Respondent agreed to allow the Applicant to remain in occupation of the Property following the payment, provided that future Licence Fee payments were made going forwards.
15. The Applicant did not make any further payments and in January 2022, the Housing Benefit payments to the Respondent stopped, as the Applicant had returned to employment.
16. On 6 February 2022, the Applicant made an application for a rent repayment order on the basis that the property was not licenced for use as a House in Multiple Occupation ('**HMO**').
17. The Applicant spent limited time in the Property during February and March 2022 as he was travelling with work. He kept little to no belongings in his room at the Property during this time.
18. In March 2022 the Applicant vacated the property. The Applicant told the Tribunal that, upon returning to the Property, he was advised by another unidentified occupier that his Licence had been forfeited and he could not live there anymore. The Applicant did not check with the Respondent whether this statement was true. He made no attempt to access his room. He did not have any belongings in the room he wished to retrieve. He just left the Property and did not return.

19. The Respondent advised the Tribunal that they had not ended the Licence. However, upon realising that the Applicant had left in March 2022, they accepted that the Licence had come to an end. Therefore, both parties agreed the Applicant's occupation had ended in March 2022. At the time the Applicant's occupation came to an end, further substantive arrears had accrued.
20. The Applicant advised the Tribunal that throughout his occupation of the Property he was not aware he was a member of a co-operative society and that he never saw any notices inviting occupiers to society meetings. He could not recall reading any notices posted around the Property. As he did not believe he was invited to meetings, he did not know whether all members had equal voting rights.
21. The Respondent submitted that it was a co-operative society and that this had been explained to the Applicant when he signed the Licence Agreement and set out clearly in the documents the Applicant had signed. The Respondent provided the Tribunal with evidence of its status in the form of a copy of the registration document from the Financial Conduct Authority (Registration No 4504), a copy of the Society's Rules, a copy of the Annual Return dated 31.1.20 and a financial statement to 31 October 2020 showing a loss for that year. The Tribunal determined that the Respondent was a co-operative society.
22. The Respondent provided the Tribunal with copies of 30 notices inviting members to attend meetings and told the Tribunal that these were posted on the notice board in the kitchen of the Property by a committee member. The Respondent submitted that the notices were posted, but that many of their members chose not to attend the meetings as their primary focus was often on their own circumstances. It was submitted that the Applicant had simply not read the notices and was not in the habit of reading documents as demonstrated by his failure to read the Licence Agreement that he signed and the letters and court documents regarding the arrears. Unfortunately, there was no evidence before the Tribunal showing any of these notices posted in the Property or evidence provided from the particular committee member who posted them. There was also no evidence from Applicant of any attempt being made by him to find out when meetings were taking place to enable him to attend, despite them being referred to directly in the Member Rules document. On the basis of the evidence submitted to the Tribunal, it was determined that, on the balance of probabilities the notices had been posted at the Property and the Applicant had omitted to take note of them.
23. The Respondent provided minutes of 31 meetings showing the names of those in attendance. A list of members was not provided by the Respondent to cross reference those names, which would have assisted the Tribunal. However, it appeared that there were some regular attendees at the meetings, as well as those who attended on an ad-hoc

basis, and that the business of the meetings that was recorded was that of the day-to-day management of the properties owned by the Respondent co-operative society, which would be consistent with the Respondent's Rules.

24. There was no evidence before the Tribunal of any members not being permitted to attend the meetings or any evidence they were not conducted in line with the Respondent's Rules. No record of the voting at the meetings was provided, but it was noted that paragraph 25 of the Respondent's Rules stated that '*Each member shall be entitled to attend and vote at a general meeting...*'. As such, the Tribunal determined that, on the balance of probabilities, the meetings had taken place, with members in attendance and had been conducted in accordance with the Respondent's Rules.
25. The Tribunal were advised that, of the total £1,500 paid by the Applicant to the Respondent, £355 was Court Costs, £138 was for gas & electricity, £139.13 was for water and £181.25 was for Council Tax. Therefore, the total rent repayment order available is £686.62.
26. In mitigation it was noted that the Respondent was a professional landlord managing multiple properties. The Respondent had not been found guilty of any other offence and had gone to great lengths to try to ensure they complied with legislation, taking regular legal advice. The Property was in good condition and, had a licence been required, there appeared to be no reason that it would not have been granted. There was no poor conduct on the part of the Respondent, who had also not enforced the Possession Order they were granted. Conversely, the Respondent submitted that the Applicant's conduct had been poor. He had fallen immediately into arrears, failed to meet a payment plan and failed to respond to the communications from the Respondent and Court. The Applicant had only made one payment after a Court Order was issued against him. He had then fallen into arrears again. The Respondent submitted that the Applicant routinely did not read documents and communications. He had not raised any challenge regarding invitations to meetings during his occupation of the property. Had he requested further information about the meetings then it would have been provided to him.

The Law

27. Housing Act 2004

Section 55 Licensing of HMOs to which this Part applies

(2) This Part applies to the following HMOs in the case of each local housing authority—

(a) any HMO in the authority's district which falls within any prescribed description of HMO ...

Section 61 Requirement for HMOs to be licensed

(1) Every HMO to which this Part applies must be licensed under this Part unless—

(a) a temporary exemption notice is in force in relation to it under section 62, or

(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

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.

...

(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.

Schedule 14 Buildings which are not HMOs for the purposes of the Act (excluding Part 1)

1(1)The following paragraphs list buildings which are not houses in multiple occupation for any purposes of this Act other than those of Part 1

(2)In this Schedule “building” includes a part of a building.

...
Buildings controlled or managed by a co-operative society

2B(1)A building where—

(a)the person managing or having control of it is a co-operative society whose rules are such as to secure that each of the conditions set out in sub-paragraph (2) is met, and

(b)no person who occupies premises in the building does so by virtue of an assured tenancy, a secure tenancy or a protected tenancy.

(2)The conditions are—

(a)that membership of the society is restricted to persons who are occupiers or prospective occupiers of buildings managed or controlled by the society,

(b)that all management decisions of the society are made by the members (or a specified quorum of members) at a general meeting which all members are entitled to, and invited to, attend,

(c)that each member has equal voting rights at such a meeting, and

(d)that, if a person occupies premises in the building and is not a member, that person is an occupier of the premises only as a result of sharing occupation of them with a member at the member's invitation.

(3)For the purposes of sub-paragraph (1) “co-operative society” means a body that—

(a) is registered as a co-operative society under the 2014 Act or is a pre-commencement society (within the meaning of that Act) that meets the condition in section 2(2)(a)(i) of that Act, and

(b)is neither—

(i)a non-profit registered provider of social housing, nor

(ii)registered as a social landlord under Part 1 of the Housing Act 1996.

Housing and Planning Act 2016

Section 40

- (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 ...
- (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
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Section 41

- (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.

Section 43

- (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 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) ...

Section 44

- (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.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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
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- (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.

Determination

- 28. The Respondent has accepted that the Property was not licenced during the period of the Applicant’s occupation. The Respondent does not deny that it was the landlord for the purposes of the 2016 Act, nor that it would be considered to be a “person having control” of the Property and/or a “person managing” the Property, in each case within the meaning of s263 of the 2004 Act. However, the Respondent claimed that the exemption under paragraph 2B of Schedule 14 of the 2004 Act applies.
- 29. The Respondent is registered as a co-operative society under the Community Benefit Societies Act 2014 and meets the condition set out in section 2(2)(a)(i) of that Act that it has shown to the satisfaction of the Financial Conduct Authority that the society is a bona fide co-operative society, as evidenced by its inclusion on the Mutuels Public Register maintained by the FCA. The Respondent is also neither a non-profit registered provider of social housing or a registered social landlord under Part 1 of the Housing Act 1996, it’s name not appearing on the registers published by the Regulator of Social Housing. On that basis, the Tribunal determines that the Respondent meets the criteria of section 1 of Schedule 14 of the 2004 Act.
- 30. The Tribunal determined that the Rules of the Respondent meet the conditions set out in paragraph 2B(2) of Schedule 14 of the 2004 Act. The conditions are set out below along with the corresponding reference to the Rules of the Respondent that sets out those criteria:
 - (a)that membership of the society is restricted to persons who are occupiers or prospective occupiers of buildings managed or controlled by the society (*Rule 12*),

(b)that all management decisions of the society are made by the members (or a specified quorum of members) (*Rule 30 and 35*) at a general meeting which all members are entitled to, and invited (*Rule 22*) to, attend,

(c)that each member has equal voting rights at such a meeting (*Rule 44*), and

(d)that, if a person occupies premises in the building and is not a member, that person is an occupier of the premises only as a result of sharing occupation of them with a member at the member's invitation (*Rule 2*).

31. Rule 2 precludes the granting or assignment of a licence to persons other than members. The Applicant was made a member and granted a Licence consistent with this rule. There was no evidence before the Tribunal that any other occupier would not have been made a member and granted a licence in the same way, which is consistent with the Respondent's Rules. Therefore, on the balance of probabilities, the Tribunal determines that all of the other occupiers of the Respondent's properties would be members and were not occupying those properties by virtue of an assured tenancy, a secure tenancy or a protected tenancy.
32. The criteria in Schedule 14 of the 2004 Act having been met in full, the Tribunal determines that the exemption applies to the Respondent and that a licence is not required as the Property would not be considered an HMO for the purposes of Part 2 of the 2004 Act.
33. In the alternative, if the criteria had not been found to be met and a licence required, the Tribunal would have considered whether the Respondent had a reasonable excuse for not having a licence. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.
34. The Respondent submitted that they did have a reasonable excuse in that they had taken legal advice and believed that they were exempt from the need to obtain a Licence for a House in Multiple Occupation by virtue of meeting the criteria under paragraph 2B of Schedule 14 of the 2004 Act.
35. The Tribunal is persuaded by the Respondents evidence that this belief was genuinely held. Steps had been taken to register as a co-operative society, draw up Rules that would seek to meet the criteria of paragraph 2B of Schedule 14 of the 2004 Act and adhere to those Rules. In all other respects the property appears to have been kept in good repair and meet the requirements for a Licence to be granted. And legal advice was taken

regarding whether a Licence was required. That being the case the Tribunal finds that, had the exemption not been found to apply, the Respondent would have had a reasonable excuse for not holding a licence and, therefore, a defence for the purposes of 72 (5) of the 2004 Act.

36. Having determined that an exemption applies, and no offence has been committed, the Tribunal determined to dismiss the Applicant's application for a rent repayment order.

Rights of Appeal

37. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
38. 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.
39. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
40. 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.

Judge C Payne
Chairman
First-tier Tribunal (Property Chamber) (Residential Property)