FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00CJ/HMF/2022/0006**
Property	**27 Burnside Road, Gosforth, Newcastle upon Tyne, NE3 2DU**
Applicants	**Mr Andrew Hodgson, Ms Chia Chiaw Yuin, Ms Hanfei Zhong**
Respondent	**Mr Abanoub Seif**
Type of Application	**Housing and Planning Act 2016 Section 41(1)**
Tribunal	**Tribunal Judge W L Brown, Mr I D Jefferson TD FRICS (Valuer Member), Mrs K Usher (Lay Member)**
Date of Hearing	**17 February 2023**

DECISION

DECISION The claim for a rent repayment order is dismissed.

REASONS

The Application

1. By application dated 10 June 2022 (the Application), Mr Andrew Hodgson and Ms Ms Chia Chiaw Yuin (known as Jowene) sought a Rent Repayment Order (RRO) pursuant to section 41(1) of the Housing and Planning Act 2016 (the 2016 Act) in relation to their occupation of the Property. By written request dated 5 August 2022 Ms Hanfei Zhong (known as Anna) applied to be joined as an Applicant, having also been an occupier of the Property. The Respondent (known as Bebo) is the person with control and management of the Property and the former landlord of the Applicants.

2. Directions were issued on 22 August 2022 pursuant to which the Applicants and the Respondents made written submissions. There was no question that the Application was brought within the statutory timeframe to do so.

3. The Directions were made without reference to Anna's application. The Respondent raised no objection to her request and having heard from the parties' representatives at the hearing the Tribunal joined Anna as an Applicant.

4. A hearing of this matter took place on 17 February 2023 at North Shields County Court. The Tribunal considered it unnecessary in view of the matters in issue to conduct an inspection.

5. Mr Hodgson attended and represented all of the Applicants (the Tribunal had sight of signed agreements to this from Jowene and Anna). The Respondent was represented by Mrs Martha Williams (his sister), accompanied by her husband, Mr Tom Williams.

6. The Tribunal was informed by Mrs Williams and had no reason to doubt, that the Property is a 3 bedroom semi-detached house.

The Law

7. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the Housing and Planning Act 2016 (the "2016 Act"), extracts from which are set out in the Annex to this decision.

8. Section 40 of the 2016 Act identifies the relevant offences, including an offence under Section 95(1) of the Housing Act 2004 (the "2004 Act") (control or management of unlicensed premises). Subsection 95(4) provides that in proceedings against a person for such an offence it is a defence that he had a reasonable excuse for having control or managing the house without the relevant licence.

9. Section 43 provides that the Tribunal may make a rent repayment order only if satisfied, beyond reasonable doubt, that a landlord has committed a relevant offence (whether or not the landlord has been convicted). Ignorance of a licensing need is generally not a reasonable excuse (Aytan v Moore and others [2021] UKUT 27 (LC)).

10. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount of any repayment - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.

11. As to Additional licensing, to implement a HMO policy for a district the local authority has to follow Part 2 of the 2004 Act. Relevant extracts for this point are:

Section 55 Licensing of HMOs to which this Part applies

"(1) This Part provides for HMOs to be licensed by local housing authorities where—

(a) they are HMOs to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 61(1)).

(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, and

(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

....."

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.

(2) A licence under this Part is a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence.

.....

(4) The local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of HMOs in their area which are required to be licensed under this Part but are not.

Evidence and relevant findings

12. At the hearing the representatives worked collaboratively to agree the sums and periods for which payments for occupation had been made.

13. The basis for the Application was that the Applicants had rented the Property as residential accommodation during 1 August 2021 to 12 March 2022 and that Newcastle City Council (NCC) had confirmed the Property was required to be licensed throughout that period as a house in multiple occupation (HMO) through its Additional Licensing scheme, but as it was not so licensed an offence had been committed by the Respondent under Section 95(1) of the 2004 Act. The local authority's position was as set out in an email dated 21 March 2022 to Mr Hodgson from Mr Thomas McFall, Senior Technical Officer, Public Protection & Neighbourhoods - Newcastle City Council. The local authority confirmed no relevant license was in place during the period mentioned.

14. From September 2019 Jowene rented a room in the Property and a separate room was occupied by a Mr Barnes. The latter moved out in August 2020 and a couple ("Charlene and Joel") moved in through to February 2021. When Charlene and Joel vacated the Property Jowene moved into an alternative room, paying an increased monthly charge and Anna moved into the vacated room. Mr Hodgson moved into the Property on 1 August 2021 and he was added to Jowene's contract, the term of which was extended for an additional 12 months at the increased monthly payment. In reality, Mr Hodgson made no direct payment for his occupation.

15. By email of 14 January 2022 Bebo gave notice to the Applicants to vacate the Property within 4 weeks. Through negotiation the Applicants agreed to leave within 8 weeks and all vacated the Property permanently by 12 March 2022.

16. The Respondent did not dispute the Applicants' position that the Property fell within the definition of a HMO for the purposes of the licensing scheme of Newcastle City Council because there were two or more separate households in occupation, using shared basic amenities. However, he argued that because the Applicants each had signed a "Lodger Agreement" they were not legally tenants and that the scheme would not apply to the facts of the case. It was not disputed that the Applicants each had exclusive possession of a bedroom and shared communal kitchen, bathroom and lounge facilities. The Respondent retained an unlocked bedroom at the Property, used principally for storage of his clothes in its wardrobe. It had a bed in it. Mr Hodgson's evidence was that he and Jowene used the room as an office.

17. The Tribunal had to be clear on the basis of potential commission of an offence, because the lay parties understood it simply to be because the Property was an HMO. The Tribunal understood from the information from Mr McFall that the particular licensing in question is that known as Additional

Licensing, which is under section 56 Housing Act 2004 (see Annex). We found that the Property was designated by Newcastle City Council within that Additional Licensing scheme, by virtue of it being an HMO. Therefore, the potential offence is under that section of the Housing Act.

18. The various occupiers of the Property were given permission by Bebo to take up residence when he undertook several trips to Australia from September 2019. In March 2020 he travelled there for an extended holiday, planned to last for 3 to 4 months; he had return flights booked. Due to the COVID-19 pandemic occurring in 2020 and the closure of international borders he became trapped in Western Australia. He made repeated attempts to return to UK but was unable to do so because of Australian COVID-19 restrictions on travel. It was not until March 2022 that he successfully returned to UK.

19. The Tribunal rejected the Respondent's primary defence of "licence not a lease". In his Reply in the proceedings Bebo stated "*As to the HMO license, I believed that as they were lodgers and only due to circumstance of the pandemic I could not be there as planned I did not need one."* We found that notwithstanding the agreements for occupation issued by the Respondent being headed as "Lodger Agreement" the Applicants enjoyed exclusive possession of the entirety of the Property throughout the period in question. It is trite law that where money is paid for exclusive occupation of a residence, the occupiers are more likely to be tenants as both commonly and legally understood. Mr Hodgson also provided an extract of text messages he exchanged with Bebo, including on 21 March 2022, but showing in the chain of exchanges a message from a previous date (not shown, but understood on a balance of probabilities from the sequence of exchanges, to be 20 March 2022) in which Bebo wrote "*As a tenant (not a lodger) you have a responsibility……"* and which followed, regarding upkeep of the Property. We found that evidence persuasive that the Respondent conceded the Applicants were in law, tenants.

20. The finding in the previous paragraph is relevant because the Respondent protested that the Applicants did not have standing to bring claims for a rent repayment order by virtue of section 41 2016 Act, which refers throughout to "tenant" as the potential Claimant. We found that argument failed for the reasons set out in the previous paragraph.

21. However, there was a fundamental point which was raised first by the Respondent in a statement in the proceedings, headed "Statement requesting reduction" in which he represented "*I was unaware an HMO license was needed particular since Andrew and Jowene were in a De Facto relationship and Andrew was effectively paying no rent."* At the hearing, Mrs Williams represented that Bebo always intended the occupation of the Applicants (and others) to be temporary, that due to being in Australia he was ignorant of the need to have the relevant licence and that the local authority did not make the obligation known to him. Therefore, the defence to the offence under section 95(1) of the 2004 Act of reasonable excuse was put before the Tribunal. If such a defence arose it must apply for the whole of the period during which it is alleged the offence has been committed. Mr Hodgson had no representations to make on this point.

22. The parties raised to the Tribunal no opposition that the Additional Licensing applicable to the Property was that contemplated by section 55(2)(b).

23. On the question of reasonable excuse the Tribunal had regard to Marigold & Ors V Wells [2023] UKUT 33 (LC) a decision of Martin Rodger KC, Deputy Chamber President in which commencing at paragraph 45 the court recorded:

> *45. When it gave permission to appeal the FTT suggested that guidance from this Tribunal on what amounted to a reasonable excuse for the purpose of section 72(5) would be welcome because it was an important issue in a relatively new jurisdiction.*
>
> *46. The question whether a person has a reasonable excuse for conduct which would otherwise amount to a criminal or regulatory offence arises in many different contexts and, thankfully, there is no shortage of guidance on how a court or tribunal should approach it.*
>
> *47. A useful example is the decision of the Upper Tribunal, Tax and Chancery Chamber, in Perrin v HMRC [2018] UKUT 156 (TCC), which was drawn to my attention by Mr Neilsen. That was a taxpayer's appeal against daily penalties for late filing of her self-assessment tax return. She said she had a reasonable excuse because she genuinely believed that she had filed her return online but had inadvertently omitted to complete the final stage of submission; when her mistake was pointed out to her she submitted a new return but this time for the wrong year. The FTT held that she had had a reasonable excuse for her initial failure to file but that this had come to an end when HMRC informed her that she had not completed the process. The taxpayer's case on appeal was that a genuine and honestly held belief that she had done what was required should afford a reasonable excuse, whether or not it was objectively reasonable for her to have held such a belief. The Tribunal held that, to be reasonable, an excuse must be objectively reasonable and that it was not enough that it be based on a genuinely or honestly held belief. At paragraph 71, it emphasised, however, that in deciding whether an excuse was objectively reasonable it was necessary to have regard to all relevant circumstances, including those of the individual taxpayer. As it explained, "because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times." Having then found that the FTT had not erred in principle in making its assessment, the Tribunal declined to interfere with it and dismissed the appeal.*
>
> *48. The Tribunal in Perrin concluded its decision with some helpful guidance to the FTT, much of which is equally applicable in the sphere of property management and licensing. At paragraph 81 it said this:*
>
> *"81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:*

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(I have omitted a fourth step because it is referable to a specific provision of the Finance Act 2009 and has no equivalent in the 2004 Act).

49. The Tribunal then dealt with a particular point which is regularly encountered in HMO licensing cases and which therefore merits attention:

"82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

24. The Tribunal interpreted this guidance on the reasonable excuse defence to mean that it should ask if was objectively reasonable for the landlord to have been ignorant of the licensing requirements at the time and whether it was objectively reasonable for him to be continue to be ignorant under the particular circumstances of the case.

25. It was known to the Tribunal that the Additional Licensing scheme became effective on 6 April 2020, shortly after the Respondent departed to Australia. No documents were before the Tribunal concerning the local authority's implementation of the scheme. Therefore, we could not determine whether the local authority had taken all reasonable steps to secure that applications for licences were made to them in respect of HMOs in their area (section 61(4) 2004 Act).

26. However, Mrs Williams confirmed that the Respondent has not been convicted of any property-related offence and there was no evidence otherwise. Nor was there evidence that Bebo was an experienced landlord. He had let out the Property temporarily while abroad. We found it credible that the letting in question was not planned to be for extended period, anticipated in 2020 to be for just a few months. but which became for an unforeseeable reason - the COVID-19 pandemic – for an extended period. That of itself would not be an excuse to the requirement to be licensed. However, we gave weight to Bebo's absence from UK, removed from communications of the local authority and that there was no particular reason for him to be aware of the specific licensing requirement, due to his inexperience as a landlord. We found no evidence that he had been contacted by the local authority concerning either the implementation of the Additional Licensing scheme, or the letting itself. He did not blame a letting agency for the omission to be licensed. He became trapped in Australia and while family attended at the Property from time to time to deal with maintenance issues they were supporting Bebo and were not his professional agents on whom he could rely in part to keep him alert about regulatory matters. His sister advised at the hearing that she too was unaware of the local authority's Additional Licensing requirement.

27. We found it credible that Bebo was ignorant of the licensing requirement. We believed him that he was unaware of the obligation until first informed of it by Mr Hodgson around March 2022, all of the occupiers vacating by 12 March 2023.

28. On a balance of probabilities we found that it was objectively reasonable for the Respondent to have been ignorant of the licensing requirements at the commencement of and continuing to be ignorant throughout, the period for which the rent repayment orders were sought.

Conclusion

29. The parties also raised matters about alleged disrepair and damage to the Property. These points were irrelevant in light of our finding set out in the previous paragraph, in consequence of which we determined that the Respondent had a reasonable excuse to the section 95(1) 2004 Act offence relied upon by the Applicants. Therefore, the test under section 43 2016 Act was not met as the Tribunal was not satisfied beyond reasonable doubt that the Respondent had committed the relevant offence.

Decision

30. The claim for a rent repayment order is dismissed.

W L Brown
Tribunal Judge
17 February 2023

Annex

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, or (b).....

(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.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 "control or management of unlicensed HMO" Section 72(1) provides: (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.

Section 41

(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.

Section 43

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

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.

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay 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.

Housing Act 2004

Section 56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either—
(a) the area of their district, or
(b) an area in their district,
as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

(2) The authority must consider that a significant proportion of the HMOs of that description in the area are being managed sufficiently ineffectively as to give rise, or to be likely to give rise, to one or more particular problems either for those occupying the HMOs or for members of the public.

(3) Before making a designation the authority must—
(a) take reasonable steps to consult persons who are likely to be affected by the designation; and
(b) consider any representations made in accordance with the consultation and not withdrawn.

(4) The power to make a designation under this section may be exercised in such a way that this Part applies to all HMOs in the area in question.

(5) In forming an opinion as to the matter mentioned in subsection (2), the authority must have regard to any information regarding the extent to which any codes of practice approved under section 233 have been complied with by persons managing HMOs in the area in question.

(6) Section 57 applies for the purposes of this section.

[Section 57 sets out considerations the local authority must take into account when deciding to designate under section 56]