FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AC/HMF/2023/0128.**
Property	:	**Flat 2, Grosvenor Lodge, 980 High Road, London N20. 0QG.**
Applicant	:	**Nyah Rolfe.**
Respondent	:	**Ismanate Investments Limited.**
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	:	**Judge Timothy Cowen** **Ms Sarah Redmond MRICS**
Date of Hearing	:	**10 October 2023**
Date of Decision	:	**8 December 2023**

DECISION

The Tribunal orders that

The application for a rent repayment order is dismissed.

REASONS FOR ORDER

The Property

1. The Property is a three bedroom flat on the ground floor of a converted semi-detached house in Whetstone.

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The Application

2. On 24 April 2023, the Applicant applied for a rent repayment order on the grounds that the Respondent had allegedly committed the offence of having control of or managing an unlicensed HMO contrary to section 72(1) of the Housing Act 2004.

3. Section 41 of the Housing and Planning Act 2016 allows a tenant to apply to the Tribunal for a rent repayment order against a person who has committed a relevant offence. The relevant offences, which are listed in section 40(3), include offences committed under section 72(1) of the 2004 Act.

4. The application makes the following allegations:

   4.1. The Respondent granted a tenancy of Room 2 of the Property to the Applicant on 27 July 2022 for a fixed term of 1 year.

   4.2. The Applicant was therefore a tenant at the Property during the 12 months leading up to the issue of this application ("the Relevant 12 Month Period").

   4.3. The tenancy was granted jointly to two other people: (1) Bethany Anita Marriott-Holmes (who had been living in the Property for the previous 2-3 years) and (2) Nia Antonen.

   4.4. Each of the joint tenants occupied one of the three bedrooms in the property. Together they shared a bathroom and a kitchen.

   4.5. The three individuals who made up the joint tenants constituted three separate households, because they were not members of the same family nor were any of them living as partners.

   4.6. On 20 September 2022, the parties entered into an addendum to the tenancy agreement, by which Nia Antonen ceased to be a tenant and was replaced by Kaitlin Spear (who was also not a member of the families of either of the remaining two tenants nor was she living as a partner of either of them).

   4.7. From 20 September 2022, therefore, the property continued to be occupied by three separate households.

   4.8. The Applicant vacated the Property on 3 April 2023, following the expiry of a notice under section 21 of the Housing Act 1988, which had been served on the tenants.

   4.9. During the Relevant 12 Month Period, the Property was an HMO which was required to be licensed, because it was in an area of additional licensing.

4.10. The Respondent had an appropriate HMO licence granted on 24 August 2917, which expired on 23 August 2022.

4.11. The Respondent did not renew the licence. Therefore, the Respondent did not have an HMO licence to be in control of or manage the Property from 24 August 2022.

4.12. The Respondent did have control and/or was managing the Property from 24 August 2022 until the Applicant left the Property on 3 April 2023.

5. The Applicant's claim is for the total sum of **£4,476.17**, being the Applicant's 1/3 share of the £1,800 monthly rent at **£600** per month for the period from 24 August 2022 to 3 April 2023.

6. The Respondent denies that it committed the offence.

The Hearing

7. The matter was heard at a remote hearing. The Applicant represented herself. The Respondent was represented by its director, Ms Eileen Dekker. Also in attendance as a witness for the Respondent was its managing agent Mr Michael Bourse of Jeremy Leaf & Co.

8. We received a bundle of documents from each side (together with an additional bundle from the Applicant responding to the Respondent's bundle) and we had the opportunity to read them before the hearing.

The Alleged HMO Offence - the elements of the offence

9. The elements of the offence alleged by the Applicant can be broken down as follows:

9.1. The Property was an HMO which was required to be licensed during the Relevant 12 Month Period.

9.2. The Property was not licensed during the period from 24 August 2022.

9.3. The Respondent had control of and/or was managing the Property during that period.

9.4. The Respondent granted a tenancy of Room 2 of the Property to the Applicants on 22 November 2019 for a fixed term of 1 year, which continued as a periodic tenancy up to and beyond the date of this application.

9.5. The Applicants were therefore tenants at the Property during the Relevant 12 Month Period.

10. We shall consider each of those allegations in turn.

Was the Property an HMO during the Relevant 12 Month Period?

11. The relevant starting point is the "standard test" in section 254(2) of the Housing Act 2004:

> "A building or a part of a building meets the standard test if–
>
> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

12. It was common ground between the parties – and we find as facts beyond reasonable doubt – that:

    (i) The Property (namely Flat 2) contains three units of living accommodation.

    (ii) It was occupied by three persons who did not form a single household, within the meaning of section 258 of the 2004 Act.

    (iii) They occupied it as their only or main residence and for no other purpose.

    (iv) Rent was payable by them under the terms of the said tenancy agreement.

    (v) They shared one or more basic amenities, namely a kitchen and a bathroom.

13. We therefore find that the Property was an HMO during the Relevant 12 Month Period because it satisfied the "standard test" above.

Is it the type of HMO which requires a licence?

14. Not every HMO is required to be licensed. Pursuant to sections 55 and 56 of the Housing Act 2004, local authorities have the power to designate areas for additional licensing under criteria set by the local authority. The London Borough of Barnet has designated the whole of the borough (pursuant to section 56(1)(a)) subject to additional licensing in relation to HMOs occupied by 3 or more people in 2 or more households. It is common ground between the parties that this additional licensing scheme was in force throughout the period of this claim.

15. We have already found as a fact that Flat 2 Grosvenor Lodge was occupied by three people who constituted three separate households during the Relevant 12 Month Period. It therefore follows that the Property was an HMO which required a licence.

16. We are therefore satisfied beyond reasonable doubt that the Property was required to be licensed as an HMO of a prescribed description for the period of the claim.

Was the Property licensed?

17. It is common ground that the Respondent held a licence (which was issued to the Respondent, but which named the Respondent's director Eileen Dekker as the person responsible) which expired on 23 August 2022.

18. Pursuant to section 72(4)(b), the Respondent ceases to be regarded as committing an offence from the date when an application is made for a new licence and while it is pending. The evidence showed that the Respondent had made an application for a new licence on 7 April 2023, which was after the period for which the Applicant is claiming.

19. The evidence before us at the hearing therefore showed that the Property was not licensed for the period from 24 August 2022 until the Applicant ceased to occupy the Property on 3 April 2023.

Was the Respondent a person managing or having control?

20. The definition is contained in section 263 of the 2004 Act. The relevant parts of that definition are as follows:

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person) ..."

21. The evidence showed that the rent reserved under the tenancy agreement was payable to the Respondent and was actually paid to the Respondent. Using our specialist expertise and experience we regard the rent charged

was a rack rent within the meaning of the Act, although no expert valuation evidence was called. The Respondent did not argue otherwise. The Respondent does not deny that it was in receipt of the rent during the Relevant 12 Month Period.

22. We therefore find as a fact beyond reasonable doubt that the Respondent was a "person in control" of the Property during the period of the alleged offence.

Elements of the Alleged Offence

23. We have therefore found that all of the elements are in place for the offence as alleged against the Respondent during the Relevant 12 Month Period. Before deciding whether it actually committed the offence, we need to consider whether there is a defence of reasonable excuse.

Reasonable Excuse

24. Pursuant to section 72(5), it is a defence if the Respondent had a reasonable excuse for managing the house without a licence.

25. The Upper Tribunal stated in relation to an HMO case in *IR Management Services Limited v Salford City Council* [2020] UKUT 81 at paragraph 40 that "the issue of reasonable excuse is one which may arise on the facts of a particular case without [a respondent] articulating it as a defence (especially where [a respondent] is unrepresented). Tribunals should consider whether any explanation given ... amounts to a reasonable excuse whether or not [the respondent] refers to the statutory defence".

26. In this case the Respondent did put forward a defence of reasonable excuse as set out below.

27. In *Palmview Estates Limited v Thurrock Council* [2021] EWCA Civ 1871, the Court of Appeal (at paragraphs 33 and 34) made the following important points about the defence of reasonable excuse in respect of this alleged offence:

    27.1. Section 72(1) creates an offence of strict liability. That means that it does not matter whether the Appellant knew that the property they had control of was an HMO which required to be licensed. That strict liability nature of the offence is part of the statutory context in which the reasonable excuse defence should be construed and applied.

    27.2. The defence of reasonable excuse is not framed in terms of failure to apply for a licence - it is framed expressly in terms of the offence itself. In other words: "a person may have a perfectly reasonable excuse for not applying for a licence which does not (everything else being equal) give that person a reasonable excuse to manage

or control those premises as an HMO without that licence." (paragraph 34 of *Palmview*)

28. In this case, the Respondent already had a licence at the commencement of the Applicant's tenancy. The licence expired during that period.

29. Applying *Palmview,* the question is therefore whether the Respondent had a reasonable excuse for continuing to let the Property after the expiry of the licence.

30. Eileen Dekker is the sole director of the Respondent company. She is a lady in her late 70s. She is not proficient at dealing with matters online (her son was assisting her at the remote online hearing), although she is fully capable of sending and receiving email.

31. Her evidence was that she knew that the HMO licence was expiring on 23 August 2022. Earlier in August, she telephoned the council to ask about renewing the Respondent's licence. She spoke to someone in the relevant department by the name of Terry. She told him that she wanted to renew her licence and that it was expiring on 23 August. Terry told her that there were severe delays in processing applications for HMO licences because of staffing issues and because the department was waiting for new HMO regulations to come into force in about November 2022. He told her that the new regulations may affect what application she needs to make and possibly whether or not she needed a licence at all.

32. It is fair to add at this point that there had previously been some confusion about whether the whole building (or both semi-detached houses taken together) might have been treated as an HMO. It was not clear what licence the Respondent needed and to cover which property.

33. Terry, on behalf of the council, told Ms Dekker that she did not need to apply until November 2022 at the earliest, because nothing would be processed until then in any event. He said that he would contact her when he knew more.

34. Ms Dekker said that this gave her the impression that she could carry on with her existing expired licence until the council contacted her. She also gained the impression that her renewed licence would be backdated to 24 August 2022, even if she applied after that date. That impression was confirmed by a later email from a different individual at the local authority confirming that a renewed licence would be backdated to 24 August 2022.

35. The Respondent bears the burden of proof on reasonable excuse, but that can be discharged on the balance of probabilities. We heard Ms Dekker give evidence and the Applicant had the opportunity to cross examine her.

We believed the evidence of Ms Dekker and we think that it is more likely than not that her evidence was a true account of that telephone call.

36. As mentioned above, Ms Dekker has to persuade us that she has a reasonable excuse for continuing to let the property after 23 August 2022 in the absence of a licence.

37. In her telephone conversation with Terry, he did not specifically tell her that she could continue to let the property without a licence. There is no evidence that she told him that the property was currently being let as an HMO. But in our judgment, Terry must have realised that there was a very high chance that someone seeking a renewal of an HMO licence was in the middle of a letting. He therefore must have realised that by advising her not to apply before November 2022, he was also advising her that she could continue to let the property on the expired licence or on the assumption that her future licence would be backdated or both. More importantly it would have been reasonable, in our judgment, for someone in Ms Dekker's position to make those inferences.

38. As far as she was concerned, she had notified the local authority of her intention to apply for a renewed licence and she had been told not to. She had also been told that she would be contacted when it was time to do so.

39. We have considered the fact that the company used a managing agent throughout the period, but Ms Dekker's evidence was that the Respondent did not delegate HMO licensing to them. Ms Dekker dealt with that process herself. That was corroborated by the evidence of the managing agent himself at the hearing.

40. We take into account that this is a renewal of a licence, rather than a new application. Although each renewal of a licence is technically a fresh application, it is reasonable (especially for a non-lawyer) to regard the position differently where one is renewing an existing licence. This is especially the case, as here, where she was given the impression that a late renewal would be backdated to cover the period immediately after the expiry of the old licence.

41. All the Respondent needed to do in order to maintain its position would have been to make an application before 24 August 2022. That would have complied with section 72(4)(b) of the 2004 Act (see above). The fact that the Respondent did not do so was only because the local authority had told Ms Dekker not to. It is not credible that Ms Dekker would have gone to the trouble of enquiring about renewing (with time in hand to make an application before expiry) and then simply failed to apply, unless she had been told by the council not to apply. We therefore accept her evidence on the balance of probabilities.

42. It is however necessary for the reasonable excuse to have persisted for the entire period of the alleged offence in order for it to constitute a complete defence. See *Marigold v Wells* [2023] UKUT 33.

43. Ms Dekker was told the new regulations would come into force in about November 2022 and she would be contacted thereafter about renewing her licence.

44. The evidence was that the local authority did not contact her in or after November. Nothing happened until she contacted them on 31 January 2023. Her evidence was that she became very ill in November 2022 with heart problems and a very severe bout of COVID. It was when she had recovered from these problems that she got in touch with the council at the end of January. Thereafter she waited to be sent the appropriate form and returned it as soon as it was sent to her. We think it is reasonable for her to have waited for a form to be sent to her by the council because:

    44.1. She had been told not to apply until the council instructed her to apply

    44.2. She did not know how to apply online and the council knew that.

    44.3. She continued reasonably to believe that she was covered by the proposed backdating of her renewed licence.

45. We therefore have decided that the Respondent's reasonable belief persisted throughout the relevant period.

46. Does all of the above amount to a reasonable excuse within section 72(5)?

47. In effect, in this case the Respondent claims to have held a mistaken belief about the law as a result of advice given to it by a council employee. Ignorance of the law can amount to a reasonable excuse in certain circumstances. In the case of *Perrin v Commissioners for HMRC* [2018] UKUT 156 TCC at para 82, the Tribunal said: "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." Obviously in this case, we should substitute "landlord" in the place of "taxpayer". In other words, ignorance of the law can be a reasonable excuse, but not by itself. There needs to be evidence of the circumstances and reasonableness of the ignorance.

48. In *D'Costa v D'Andrea* [2021] UKUT 144, a council employee had told the landlord that she did not need a licence and that "he, or the local authority, would tell her if the position changed and the property needed a licence".

The Upper Tribunal decided that this constituted a reasonable excuse. The quoted words are important because they removed the obligation from the landlord to take reasonable steps to keep informed. In effect, in D'Costa, the council was saying to the landlord: you do not need to keep yourself informed, because we will inform you.

49. We regard the present case as being very close on the facts to the *D'Costa* case, particularly as an example of the principle that the council's advice through Terry had removed the Respondent's obligation to take the reasonable and obvious step of simply putting in an application form in August 2022, which the Respondent clearly was intending to do before Ms Dekker spoke to Terry.

50. Taking all of this into account, we find that the Respondent had a reasonable excuse, which covers the whole of the period for which the claim is made.

The Alleged HMO Offence: Conclusion

51. It follows that we find that the Respondent has not committed the offence as alleged under section 72 of the Housing Act 2004, because it had a reasonable excuse for continuing to manage the Property without a licence.

52. We therefore cannot and do not make a rent repayment order in this case.

Dated this 8th day of December 2023

JUDGE TIMOTHY COWEN

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).