FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AN/HMF/2023/0239**
Property	:	**Room 3, Flat 3, 14 Westville Road, Shepherds Bush, London W12 9BD**
Applicant	:	**Ms Bethel-Katriel Shield-Armah**
Representative	:	**N/A**
Respondents	:	**Acre Properties (1988) Ltd**
Representative	:	**Ms Jeanette Cunningham**
Type of Application	:	**Application for a rent repayment order by tenant ; Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Tribunal	:	**Judge N O'Brien** **Tribunal Member Mr S Wheeler MCIEH CEnvH**
Date of Decision	:	**14 May 2024**

DECISION

Decision of the Tribunal

(i) The tribunal dismisses the application for a rent repayment order.

(ii) The tribunal does not make any order for the reimbursement of fees pursuant to Rule 13(3) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. By an application initially received by the tribunal on 7 September 2023, and amended on 20 October 2023 the applicant applied under s.41 of the Housing and Planning Act 2016 (HPA 2016) for rent repayment order (RRO) in relation to rental payments made in respect of her occupation of Room 3 Flat 3, 14 Westville Road, Shepherds Bush London W12 9BD (the flat). The respondent is the current leasehold owner of the flat, which consists of a 3 bedroomed purpose built flat situated in the London Borough of Hammersmith and Fulham. The respondent has been the registered owner of the flat since 28 January 2021. Prior to that date the registered owner was a Mr Alastair Kerr. The tribunal understands that the respondent is a company which is owned and effectively controlled by Mr Kerr.

2. Ms Shield-Armah sought a RRO in respect of the sum of £8160 paid to the Respondent as rent between November 2021, when her tenancy commenced and November 2022. Ms Shield-Armah remains in occupation of Room 3 however the tribunal understands that the respondent has issued a claim for possession of Room 3 and a money judgment in respect of alleged rent arrears.

3. Unfortunately the applicant did not include any particulars of the respondent when she initially sent her application to the tribunal on 7 September 2023. She remedied this by sending an amended application which included the respondent's details on 20 October 2023. Unfortunately the applicant did not include the correct email address for the respondent and consequently the respondent did not receive any correspondence from the tribunal. On 17 April 2024 Ms Cunningham contacted the tribunal on behalf of the respondent by email to say that the respondent had just learned of the proceedings and of the upcoming hearing. The respondent on 24 April 2024 formally applied to vary the directions and to adjourn today's hearing on the basis that it had insufficient time to prepare their defence. In the interim the respondent supplied the tribunal with documents including a HMO licence which had been granted to Mr Kerr on 7th November 2018 for a period of 5 years and which was in place at all material times throughout Ms Shield-Armah's occupation. The documents also included an email exchange between Mr Kerr and a Mr David Awomolo on 4th November 2020. Mr Awomolo's email indicates at the time that he was a Private Housing and Licensing Officer employed by the London Borough of Hammersmith and Fulham. The thrust of Mr Awomolo's email was that there was no need to transfer a number of HMO licences then held by Mr Kerr in respect of a number of properties into the name of the proposed transferee.

The Hearing

4. The applicant attended alone and represented herself. The respondent was represented by an employee Ms Cunningham, but Mr Kerr and two other employees of the respondent were also present at the hearing. At the start of the hearing we asked both the applicant and the respondent if they wished to proceed with the hearing today. We explained that there were essentially three issues which would be relevant to the application; firstly whether we were satisfied to the criminal standard that a relevant offence had been committed

under section 72 of the Housing Act 2004; secondly, whether we were satisfied that the respondent had a reasonable excuse; and thirdly, whether we should make an RRO and in what amount. We explained that matters of conduct, and in particular the condition of the flat, would only be relevant to the third issue and that we were concerned that the respondent may not have had sufficient time to prepare its defence, particularly in relation to the third issue.

5. The applicant requested that we deal with all three issues today. She indicated that, notwithstanding the fact that she had included the wrong email address in the amended application, she had sent the relevant documents to the person who had been managing this particular property throughout her occupation on behalf of the respondent, although she had subsequently learned that it had gone into his junk folder. Miss Cunningham submitted that the respondent had supplied sufficient material to permit the tribunal to fairly decide the first and second issues, but that the respondent had not had enough time to prepare its defence in relation to the third.

6. We considered that we could consider the first and second issues today, but that if we concluded that the grounds for making a RRO were made out and that the respondent had failed to establish that it had a reasonable excuse, then a further hearing would be required before we could fairly consider whether to make a RRO and in what amount. We considered that it would be fair and proportionate to deal with the first two issues today, and proceeded to hear evidence and argument in relation to those issues only.

7. The applicant does not set out in her witness statement or application who lived in the property throughout the period of her occupation. However on our questioning the applicant indicated from the start of her tenancy in November 2021 to date she had shared the flat with 2 other occupants although the occupants each of the other two rooms in the flat changed several times throughout that period, and there were short periods during which one or both of the rooms were not occupied.

8. The respondent for its part did not dispute that during the relevant time, being the 12 month period prior to the date of the application, the number of individuals in occupation of this particular flat meant it was a HMO as defined by Schedule 14 to the Housing Act 2004. The respondent did not dispute that those occupants occupied the flat as their main residence, formed more than 1 household and shared amenities such as the bathroom and kitchen and that consequently it was a property which was required to be licenced. The tribunal is aware that all parts of the London Borough of Hammersmith and Fulham are subject to an additional licencing regime which applies to all shared properties with three or more occupants who form more than one household.

The Law

9. Section 40 of the HPA 2016 provides;

(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.

10. Section 41 of the HPA 2016 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.

11. Section 43 of the Act 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);

12. Section 72(5) of the Housing Act provides that in proceedings against a person for an offence of being in control of or managing an unlicenced HMO it is a defence that he had a reasonable excuse for having control of or managing a HMO without a licence.

13. Section 68(6) of the Housing Act 2004 provides that a HMO licence cannot be transferred to another person.

14. Finally section 44(1) HPA 2016 of the Act provides that where the First-tier Tribunal decides to make a rent repayment order under s41(1) in favour of a

tenant, the order may be made in relation to rent paid over the period not exceeding 12 months during which the landlord was committing the offence.

15. The tribunal must consider whether or not the respondent has a reasonable excuse for committing the relevant offence irrespective of whether the respondent has raised the issue. However it is for the respondent to satisfy the tribunal that the defence is made out on the balance of probabilities; it is not for the applicant to disprove it (*Thurrock Council v Palm View Estates [2020] UKUT 355 (LC))*

16. In *D'costa v D'andrea and others [2021] UKUT 144(LC)* the Upper Tribunal considered that a landlord had made out a defence of reasonable excuse when she had been told, incorrectly, by an employee of the relevant local authority, that she did not require a HMO licence. Conversely in *Marigold et al v Wells* (2023) UKUT 33 (LC) the Upper Tribunal overturned a decision of the FTT to dismiss an application for an RRO on the basis that the landlord had been told that he did not require a licence at the time the tenancy was entered into. The Upper Tribunal concluded that the FTT should have considered whether it was reasonable for the landlord to continue not to check if a licence was required over time, even if it was initially reasonable at the time the requirement for a licence was introduced.

Reasons for the Decision

17. There was no material dispute between the parties as regards the first issue. As regards the second issue applicant did not concede that the defence of reasonable excuse was made out. We consider that the facts of this case are very similar to the facts in *D'Costa* (above). In this case Mr Kerr asked an employee of the appropriate department of London Borough of Hammersmith and Fulham whether it was necessary to take any steps to vary or transfer the HMO licences which the local authority had issued to him prior to the transfer of ownership to the respondent company. The advice that the local authority gave him was to permit the current licences to continue in his name until they expired, and then to apply to renew the licences in the name of the transferee. This advice was both clear and wrong; Mr Kerr should have been advised to apply for a fresh licence in the name of the transferee company. We consider that it was reasonable for the respondent to rely on the advice given to Mr Kerr by the local authority notwithstanding the fact that the licence on its face stated that it was not transferrable. In our view this case can be distinguished from the case of *Marigold v Wells* because here the advice given by the local authority was that there would be no need to do anything until the current licences expired.

Conclusion

18. Consequently we have concluded that while the respondent was in control of or managing an unlicenced HMO contrary to section 72 of the Housing Act 2004 during the 12 months prior to this application, it had a reasonable excuse for so doing. The application is therefore dismissed.

19. As the application has been dismissed there is no basis to make an order for the reimbursement of fees under Rule 13(3).

Name : Judge N O'Brien **Date of Decision 14th May 2024**

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).