



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

Case Reference : **BIR/00FY/HMG/2020/0001**

Property : **Apartment 22, 1A Hollowstone, Nottingham,
NG1 1JH**

**Applicants
Represented by** : **(1) Edward Gillman, (2) Giuseppe Buonaito
Justice for Tenants**

Respondent : **(1) Ammar Hijazi, (2) Lilly Maria Cecilia
Norrman (also known as Maria Norrman)**

**Type of
Application** : **Application for a Rent Repayment Order,
section 41 of the Housing and Planning Act
2016**

Tribunal Members : **Judge C. P. Tonge LLB, BA
Mr D. A. Lavender CIEH, Dip Law, Dip Surv**

Date of Decision : **12 November 2020**

DECISION

Application and Background

1. On 31 January 2019, Edward Gillman and Giuseppe Buonaito "the Applicants" became the tenants at Apartment 22, 1A Hollowstone, Nottingham, NG1 1JH "the property". This tenancy was for a period of 12 months, expiring 30 January 2020, at a rent of £995 per calendar month.
2. Ammar Hijazi and Lilly Maria Cecilia Norrman (also known as Maria Norrman) are "the Respondents" and they are specified as being the landlords of the property in the assured short hold tenancy agreement, granting a tenancy to the Applicants in this case.
3. At all material times the Respondent Lilly Maria Cecilia Norrman has held the remainder of a 999 year lease on the property.
4. By an application received on 14 September 2020 the Applicants seek a rent repayment order in relation to their occupancy of the property from 31 January 2019 to 19 September 2019. The period of the application being limited to that final date, even though the tenancy was still running, because the Applicants recognise the fact that such an order cannot be made after the local authority receive an application for a licence to rent out the property that results in a licence being granted. The Respondents made such an application to the local authority on 19 September 2019 and as such the last date that this Tribunal could make a rent repayment order is in fact 18 September 2019. The Applicants calculate the rent repayment order that they seek as being £7,574.90.
5. On 18 July 2017 Nottingham City Council designated the area that contains the property as being part of a selective licensing scheme in accordance with Part 3 of the Housing Act 2004, "the 2004 Act". On 8 February 2018 this designation was approved by the Secretary of State for Housing, Local Government and Communities, to become effective on 1 August 2018. As a result of this the property whilst being privately rented requires a licence for this to be done and it is an offence under section 95 (1) of the 2004 Act to operate the property without such a licence. The Respondents do not challenge the fact that the property was let out to the Applicants without a licence, but raise the defence under section 95 (4) of the 2004 Act.
6. Directions were issued on 14 September 2020 by Regional Judge Barlow indicating that this case could proceed without the need for the Tribunal to inspect the property and could be determined without the need for an oral hearing. The Parties agreed with this procedure and submitted hearing bundles. This Tribunal sat on 6 November 2020 to determine the issues in the case upon consideration of the evidence contained within those bundles.

7. The Tribunal will refer to items of written evidence, where it necessary to do so, when issues are being determined.

The law

Housing Act 2004 "the 2004 Act"

Section 87 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).
- (5) The appropriate national authority may by regulations make provision about the making of applications under this section.
- (6) Such regulations may, in particular—
 - (a) specify the manner and form in which applications are to be made;
 - (b) require the applicant to give copies of the application, or information about it, to particular persons;
 - (c) specify the information which is to be supplied in connection with applications;
 - (d) specify the maximum fees which may be charged (whether by specifying amounts or methods for calculating amounts);
 - (e) specify cases in which no fees are to be charged or fees are to be refunded.

Section 95 Offences in relation to licensing of houses under this Part

- (1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.
- (2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) 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 failing to comply with the condition,

as the case may be.

(5) A person who commits an offence under subsection (1) is liable on summary conviction to a fine .

(6) A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(6B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(7) For the purposes of subsection (3) 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

(b)if they have decided not to do so, one of the conditions set out in subsection (8) is met.

(8)The conditions are—

(a)that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b)that an appeal has been brought against the authority’s decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(9)In subsection (8) “relevant decision” means a decision which is given on an appeal to the tribunal and confirms the authority’s decision (with or without variation).

The Housing and Planning Act 2016, "the 2016 Act"

Section 40 Introduction and key definitions

(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)pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(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.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(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.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

(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);

(b)section 45 (where the application is made by a local housing authority);

(c)section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

(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

(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.

The Determination

8. The Tribunal determines that the offence of controlling or managing a property that requires a licence, but that is not so licensed, committed under section 95 (1) of the Housing Act 2004 is an offence that is covered by section 40 of the Housing and Planning Act 2016 "the 2016 Act", being mentioned in row 6 of the table in section 40.
9. The Tribunal notes that on 19 September 2019 Nottingham City Council received an application from the Respondents for a licence for the property. The Tribunal then considers section 95 (3) (b) of the 2004 Act and determines that by virtue of the operation of that part of the section, as at 19 September 2019 the Respondents have a statutory defence to this offence in that the made on 19 September is an effective application for such a licence (Applicant's application to the Tribunal, Gmail page 6 and appendix 2).
10. The Tribunal determines that the Applicants were tenants of the unlicensed property within the terms of section 41 of the 2016 Act and considering section 41 (2) (b) of the 2016 Act the Tribunal notes that the application for the rent repayment order was received by the tribunal office on 14 September 2020. This is within 12 months of the date that the offence ceased to be committed on 18 September 2019. The application to the Tribunal is therefore made within the twelve month time limit.
11. The Tribunal then considers the requirements of section 43 of the 2016 Act. The Tribunal can only make a rent repayment order if it is satisfied beyond reasonable doubt that an offence listed in section 40 of the 2016 Act has been committed. Putting the defence pursuant to section 95 (4) of the 2004 Act on one side for the moment, this Tribunal is satisfied beyond reasonable doubt that an offence pursuant to section 95 (1) of the 2004 Act has been committed. The Tribunal in making this determination relies upon the evidence of the Applicants, the evidence from the local authority (appendix 2 of the Respondents bundle and elsewhere in the bundles) and the fact that the Respondents do not challenge this evidence.

12. The Tribunal next considers the defence pursuant to section 95 (4) of the 2004 Act. The Respondents' case is that on the first day of this tenancy they caused a check to be made of the local authorities web site "portal" and this revealed that the property did not require a licence. This was an error on the part of the local authorities portal, acknowledged as such in appendix 2. When the Respondents became aware that there had been an error and that the property did require a licence they applied for a licence without delay. This is supported by appendix 1 (paragraph 13, below) and appendix 2 (paragraph 14, below).
13. Appendix 1 is headed "Landlord Licence Application" at https://my.account.nottinghamcity.gov.uk/service/landlord_licence_application. The three page form is divided into 4 sections. The first contains full details of the property that are accurately recorded. The second confirms that the property was, on 31 January 2019, occupied by two persons in two households. The third states that the same maximum occupancy will continue in the future. The fourth, after a button entitled "Check Licence Requirements", indicates that the property does not require a licence.
14. Appendix 2 is a letter from David Hobbs, Selective Licensing Manager at Nottingham City Council's Safer Housing Team and is addressed to the First Respondent, Mr Hijazi, dated 30 September 2020. Mr Hobbs gives a postal address, email address and telephone number at which he may be contacted. This two page letter refers to the property, details of which are correctly recorded, and the fact that Mr Hijazi has informed the local authority of these proceedings. The letter refers to the selective licensing scheme and then deals with appendix 1, indicating that appendix 1 states that the property was not licensable as at 31 January 2019 and referring to the portal address already stated above. The letter states that at the time the appendix 1 search was made there was a "system glitch" that could have resulted in this incorrect result being provided. The letter states that a timely application was made for a licence when the error was brought to the attention of the Respondents and that no further enforcement action is to be taken by the local authority against the Respondents. The letter encloses a copy of appendix 1.
15. The Applicants seek to throw doubt upon the veracity of appendix 1, but without providing any evidence to support this assertion, choosing instead

to rely upon a critique of appendix 1. In addition, or alternatively, they contend that even if, on the balance of probability, the defence being relied upon by the Respondents is found to be made out then the Tribunal could still make a rent repayment order for the period 1 July 2019 to 19 September 2019.

16. The Tribunal first considers the Respondents' appendix 1. The Tribunal notes that the document is clearly from the local authority portal because it is a formal document showing the email address provided by the local authority in appendix 2. Further, the document bears a reference number that would permit the local authority to check the veracity of appendix 1 as part of their investigations. Further, the Tribunal notes that the person making this search had an account with the local authority, adding more of a formal relationship between the local authority and the person searching. If in any way appendix 1 were not a valid document the Tribunal would expect the local authority to make this clear in their letter at appendix 2. The local authority had appendix 1 in their possession, it is stated to be enclosed at the last two lines on appendix 2.
17. The Tribunal is satisfied that appendix 1 is a genuine document establishing that the Respondents caused a check to be made at the commencement of this tenancy via the local authority portal and that in error that check revealed to them that they did not need a licence to rent out the property. This is further supported by the local authorities admission in appendix 2 that at the time that the search was made the portal had a "system glitch" that could permit this error to take place. The Tribunal therefore determines that the defence pursuant to section 95 (4) of the 2004 Act is made out from the start of the tenancy to at least a date in July 2019.
18. The Tribunal then considers whether or not the defence pursuant to section 95 (4) of the 2004 Act applies to the whole period in which the rent repayment order is requested.
19. The Tribunal notes that a rent repayment order is partly intended as a punishment to a landlord or manager that has committed a criminal offence. As such the Tribunal must be careful to ensure that its overriding objective to be fair and just is complied with (Rule 3 of the Tribunal

Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, as amended) "the Rules".

20. The Applicant seeks to persuade the Tribunal in these circumstances to make a rent repayment order for the period 1 July 2019 to 19 September 2019. The Tribunal determines that it would be wrong to adopt this approach. The local authority do not give any specific date in appendix 2, simply mentioning the months of July to September. The Respondents seek to suggest that the correct approach is to choose the date most unfavourable to the Respondents. On the contrary, the Tribunal determines that if it is appropriate to choose a date in July at all, that because this is a punitive provision the overriding objective to be fair and just requires the date most favourable to the Respondents to be chosen. The Tribunal also takes note of the fact that during the period July to September 2019, the Enforcement Team (once it had received the information from the Safer Housing Team) had to make "various enquiries". As such the Tribunal determines that if a rent repayment order is to be made despite the defence pursuant to section 95 (4) of the 2004 Act, this could only be made for the 50 days between 31 July 2019 to 18 September 2019, inclusive.
21. The Tribunal repeats in full the passage from appendix 2 that deals with this part of the case. "As you know the Property was later identified by the Safer Housing Team as requiring a licence in July 2019. The Enforcement Team made various enquiries and during the period between July to September 2019, the requirement to licence your property was brought to your attention and a timely application was made by you on 19 September 2019."
22. The Tribunal notes that no specific date is stated as to when this licence requirement was brought to the attention of the Respondents. The requirement for the existence of a licence was established by the Safer Housing Team and then passed to the Enforcement Team who had to make various enquiries. Only then did the Enforcement Team seek to bring this to the attention of the Respondents who made a timely application for that licence. The Tribunal determines that on the basis of this paragraph it is perfectly reasonable to conclude that the Respondents acted in a timely manner, any time delay being at the hands of the local

authority staff. The defence is available for the whole period that is covered by the application for a rent repayment order.

23. The Applicant seeks to raise a lack of additional correspondence that must exist between the Respondents and the local authority on this point. They submit that this is a breach of Direction 5 (b) and as such the Tribunal should hold this breach against the Respondents. The Tribunal does agree with the Applicants to the extent that there probably has been a breach of Direction 5 (b) by the Respondents failure to include all correspondence (in whatever form it may be) on this point. However, the Tribunal is satisfied that appendix 1 and appendix 2 cover that which needs to be covered to establish this defence. The Tribunal therefore determines that it is fair and just to waive any breach of Direction 5 (b) by the Respondents pursuant to Rule 8 (2) (a) of the Rules.
24. The Tribunal further notes that the local authority had a decision to make as to whether to prosecute, levy a civil penalty or take no action in respect of the suspected breach of section 95 (1) of the 2004 Act. The local authority have decided to take no action against the Respondents in relation to this matter (appendix 2). The Tribunal approves of this decision.
25. This case has been dealt with during the Covid 19 pandemic. This Tribunal has considered the procedures adopted during this case, the only significant change has been to permit service of evidence by email. The Tribunal is satisfied that the case has been dealt with in a fair and just manner.
26. Considering all the factors referred to above the Tribunal determines that the Respondents may rely upon the defence in section 95 (4) of the 2004 Act to cover the whole of the period in which a rent repayment order is requested. As such, for these purposes, the Tribunal determines that the Respondents are not guilty of having committed the offence alleged pursuant to section 95 (1) of the 2004 Act.

Decision

27. The Tribunal decides that for the purposes of the issue of a rent repayment order, the Respondents have not committed the offence as alleged pursuant to section 95 (1) of the Housing Act 2004, because the defence

provided by section 95 (4) of the 2004 Act applies to their conduct. The Tribunal will not make a rent repayment order.

28.If either Party wishes to appeal against this decision to the Upper Tribunal, that Party has 28 days from the date that this decision is sent to the Parties to ask this Tribunal for permission to appeal. That must be done by delivering to this Tribunal an application for permission to appeal, stating the grounds of the appeal, the particulars of the appeal and the outcome that the party seeks to achieve by making the application.

Judge C. P. Tonge

12 November 2020