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

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| **Case reference** | : | **BIR/00FY/HMK/2020/0051 & 52** |
| **Property** | : | **7 Sneinton Hollows, Sneinton, Nottingham NG2 4AA** |
| **Applicants** | : | **Ms Maisie Williamson ('First Applicant)**<br>**Mr Daniel Hopka (Second Applicant')** |
| **Representative** | : | **Daniele Franz**<br>**Justice for Tenants** |
| **Respondent** | : | **Mr Harry Thomas Warren** |
| **Representative** | : | **Lisa Wainwright**<br>**Cleggs Solicitors** |
| **Type of application** | : | **Application by a tenant for a Rent Repayment Order under section 41(1) of the Housing and Planning Act 2016** |
| **Tribunal member** | : | **P Wilson** BSc (Hons) LLB MRICS MCIEH CEnvH<br>**Judge A McNamara** |
| **Date and place of hearing** | : | **Determined on the basis of written representations** |
| **Date of decision** | : | **23rd December 2020** |

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**DECISION**

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## Introduction

1. This is a decision on an application for a Rent Repayment Order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').

2. Part 3 of the Housing Act 2004 ('the 2004 Act') provides for local housing authorities to designate all or part of their district as subject to selective licensing. Section 95(1) of the 2004 provides that a person commits an offence if he is a person having control of or managing a house which is required to be licensed but is not so licensed.

3. Section 41(1) of the Housing and Planning Act 2016 ('the 2016 Act') provides that a tenant or former tenant of a property where the landlord has committed an offence under section 95(1) of the 2004 Act may apply for a Rent Repayment Order whether or not the landlord has been convicted.

## Background

4. The Respondents granted the Applicant a tenancy of 7 Sneinton Hollows, Sneinton, Nottingham NG2 4AA ('the Property) on 21 October 2016. It was a standard assured shorthold tenancy arranged by the landlord's agent for a six month term at a rental of £450 per calendar month. It continued as a periodic contract at a rental of £450 per calendar month until the applicants vacated the premises on the 31 May 2020. Rental payments were made to the Respondent's agent, Robin Thomson Estate Agent.

5. On 1 August 2018, Nottingham City Council ("NCC") made an order designating the area in which the Property is located as subject to selective licensing under section 80 of the Housing Act 2004 ("the 2004 Act").

6. The Applicants applied for a rent repayment order on 11 July 2020. They seek an order for repayment of 12 months rent at £450 per month, totalling £5,400.00, the applicable period being 1 August 2018 to 31 July 2019.

7. The Tribunal issued directions on the 24 July 2020 and directed that both parties provide statements of their case and that, unless either party objected, the application would be determined on the basis of the written statements of case. No objection was received and the Tribunal has therefore determined this application. This document gives the Tribunal decision and the reasons for it.

## Law

8. Section 40 of the Act provides that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent which has been paid by a tenant.

9. Section 41 of the Act provides:

***41 Application for rent repayment order***

*(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.*

10. Section 43 of the Act provides:

***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.*

The relevant offences are detailed in the table in section 40(3) of the Act as follows:

| | *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 |

11. Section 44 of the Act provides:

***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.*

| If the order is made on the ground that the landlord has committed | the amount must relate to rent paid by the tenant in respect of |
|---|---|
| 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.*

12. Before a rent repayment order is made, the Tribunal must be satisfied, beyond reasonable doubt, that a designated offence has been committed (see section 43(1) of the 2016 Act). An offence under section 95(1) of the 2004 Act is such a designated offence.

13. The relevant part of section 95 provides:

*"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.*

14. Section 263 of the 2004 Act defines a "person having control" and a "person managing" for the purposes of section 95. It provides:

***263 Meaning of "person having control" and "person managing" etc.***

*(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), or who would so receive it if the premises were let at a rack-rent.*

*(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.*

*(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—*
- *(a) receives (whether directly or through an agent or trustee) rents or other payments from—*
  - *(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and*
  - *(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or*

> (b) *would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;*
>
> *and includes, where those rents or other payments are received through another person as agent or trustee, that other person.*

## The Property

15. Because of current COVID-19 restrictions no inspection was carried out. However, from the documentation and photographs submitted and access to publicly available online street view information it may be said that the Property is a three storey (including loft), three bedroom end terrace house built probably in the latter half of the nineteenth century. A passageway to the right hand side of the property gives access to a cul-de-sac with residential properties at the rear. It has brick elevations under pitched roofs with original slate covering.

## The Evidence/Submissions by Each Party

16. The Applicants' evidence comprised an expanded statement of reasons of reasons for the application prepared by Daniele Franz of Justice for Tenants and 14 documents (including copy photographs) A – N.

17. The Respondent's evidence comprised a defence statement prepared by Lisa Wainwright of Cleggs Solicitors and one exhibit A.

The Applicants' Evidence

18. The Applicants produced Land Registry title documents which confirmed that the Respondent has owned the freehold since 31 July 2007 and a copy of the assured shorthold tenancy showing that the tenancy commenced on the 21 October 2016. The property was managed by Robin Thomson Estate Agent of 53 Mansfield Road, Nottingham with the rent being paid to Robin Thomson.

19. The Applicant states that they experienced difficulties with the property condition during the tenancy and produced copy emails with both the managing agent and the Nottingham City Council, the local housing authority. They complained about a range of issues starting with an email to the managing agent dated 7 August 2018 relating to security concerns arising from the lack of a fence to the rear of the property which had been taken down on the 3 July 2018 and not replaced. It referred in addition to decoration not being made good after a leak to the bathroom and double glazing not being fitted.

20. A further email to the managing agent (after the period for which the rent repayment order is sought), dated the 21 October 2019, acknowledged the fitting of extractor fans, new automatic fire detection and electrical and

gas safety checks being carried out. However, the email referred to the gas safety check showing a gas leak from the boiler to be present and although boiler parts were replaced there was still problems with the boiler needing to be repressurised twice daily and also that the gas fire had been taken out of use as considered unsafe. There was further email correspondence in respect of property condition issues until shortly before the Applicants vacated the premises on the 31 May 2020.

21. The Applicant produced a copy letter dated the 22 April 2020 from an Enforcement Officer from Nottingham City Council which confirmed that an inspection of the Property was carried on the 9 March 2020. The letter enclosed a copy of the Housing Report sent to the Respondent which listed 42 matters requiring attention all of which were categorised as legal requirements rather than recommendations or observations. The issue of such reports as a precursor to formal enforcement action is a common practice by local housing authorities.

22. The Housing Report indicated that the matters referred to were considered to be deficiencies contributing to 12 different hazards under the Housing Health and Safety Rating System. The hazards included damp & mould growth, excess cold, food safety, falling on stairs etc and falling between levels, electrical hazard and fire. Photographs submitted by the Applicants, whilst of low quality, are consistent with deficiencies listed in the Housing Report

23. The submission on behalf of the Applicants included a copy of the Public Notice published by Nottingham City Council which stated that an area of its district had been designated as subject to selective licensing and that the Secretary of State for Housing, Communities and Local Government had confirmed the Designation and that it would come into force on the 1 August 2018. The Designation includes the Dales ward in which the Property is located.

24. The Applicants approached Justice for Tenants after becoming aware of the breach of licensing requirements after they had contacted the Council because of their concerns over property condition. Daniele Franz of Justice for Tenants emailed the Selective Licensing Team of Nottingham City Council on the 2 April 2020 seeking information on the licensing status of the Property. A reply the same day stated that the Property was not licensed at that time, that an application for a licence had been made on the 7 August 2019 and that work had been done to prepare it for a draft licence.

25. The submission by the Applicant included copy bank statements which evidenced twelve payments of £450 for each of the months during the applicable period.

The Respondent's Evidence

26. The defence statement submitted on behalf of the Respondent accepted the submissions of the Applicant in particular in the following respects:

    (i) The relevance and applicability of the statement of the law in respect of the offence under section 95(1) of the 2016 Act;

    (ii) The selective licensing designation came into effect as of the 1 August 2018 and the Property falls within the designated area;

    (iii) The Property is a two bedroom end terrace house solely occupied at the respective times by the Applicants as their main residence and accordingly does not meet the criteria for an HMO;

    (iv) Section 79 of the 2004 Act applies and section 85(1) of the 2004 Act applied, the Property does not fall within any of the specified exemptions and a Licence was required for the relevant period;

    (v) The Applicants were tenants of the property and were residing under an assured shorthold tenancy .

27. Whilst acknowledging that a licence was not held during 1 August 2018 and 31 July 2019, the statement submitted that at all relevant times, the Property was a full managed property by Robin Thomson as the Respondent's agent; it was further submitted that this included any necessary applications to the local Council required of the Respondent, as evidenced in the tenancy agreement exhibited in the Applicant's bundle. So far as the Applicant was aware, the Agent had made all the necessary applications for any selective licences required in respect of the Respondent's portfolio of properties managed by the agent.

28. The statement further submitted that the Respondent was aware that, despite the selective licensing designation coming into force on the 1 August 2018, Nottingham City Council were ill prepared for the influx of applications and there were severe delays through no fault of the Respondent. As soon as the issue of the selective licence was brought to the attention of the Respondent, the situation was remedied immediately in 2019. The statement goes on to say that other issues relating to the conduct of the Respondent's agent were brought to light with the result that the agency agreement was terminated.

29. The statement submitted that, whilst the Respondent was indeed listed as the landlord on the tenancy agreement, it was emphasised again that at times the Property had been under the management of the Respondent's agent, although it was acknowledges that he was the freeholder.

30. With regard to the assertion by the Applicant that the Respondent is the 'person having control' and 'person managing' the Property within the

meaning of section 263 of the 2004 Act, the defence statement denied that the Respondent was the person having control or person managing given that the full managing agent was in place and/or was unaware until August 2019 that there was no application and/or licence in place for the Property. The statement accepted that the Respondent received partial rent payments from the managing agent once the 10% management fee had been deducted at source, leaving a monthly payment of £54.

31. The statement denied that there had been systemic safety issues at the Property as alleged by the Applicant.

32. With regard to the amount of the rent repayment order claimed, the defence statement agreed the rental payment for the period 1 August 2018 to 31 August 2019 but drew the attention of the Tribunal to their obligation to consider '… the conduct of the landlord, the financial circumstances of the landlord, whether or not the landlord has been convicted of a relevant offence or has received a financial penalty and the conduct of the occupiers'.

33. The defence statement acknowledged that that the Applicants had paid their rent on time but denied that '… their behaviour have at all times been reasonable as alleged or otherwise'. The only submission in respect of their behaviour was that following the Housing Report produced by the local housing authority was an allegation that the Applicants, in particular the First Applicant refused the Respondent's contractors access for three weeks for no valid reason.

34. The defence statement further denied that no works had been carried out or as alleged. The statement submitted that all emergency works for example to the boiler were completed as priority costing approximately £500 and such cost should be taken into account in relation to the claim. The defence statement further submitted in respect of repairs that the local housing authority officer inspected the Property on the 9 March 2020 and the entire country went into the COVID-19 shutdown on the 23 March with restrictions on persons entering the properties of others other than for essential works. 'It therefore follows that any works which were required by the Report which were not of a priority listing were not permitted to be undertaken in any event during the COVID-19 pandemic.' The statement draws attention to the First Applicant acknowledging this in a 6 May email to the local housing authority officer. The boiler was a priority and was completed once the First Applicant allowed access which took three weeks to obtain.

35. The defence statement submitted that the Respondent has not been convicted of any applicable offence at the time of these proceedings.

36. In relation to the Respondent's financial position, the defence statement submitted that the Respondent received £396.00 monthly rent after deduction of fees) but made mortgage payments of £201.29 and insurance

premiums of £16.66 leaving £178.05 per month net. In terms of maintenance, the defence statement referred to £500.00 'to the boiler alone'. The statement further refers to the impact of the COVID-19 pandemic, submitting that the Respondent had been 'hit hard with rent concession requests with no legal process in place to recover any debts .... given the Government current restrictions under the Coronavirus Act 2020...'.

37. The defence statement concluded by asking that, in the event that the Tribunal were to find any sums repayable to the Applicants, any such sums should be repayable by a reasonable repayment plan.

## Discussion

Has a Relevant Offence Been Committed?

38. The first issue to determine is whether the Tribunal is satisfied to the criminal standard that an offence under section 95 has been committed. From the submissions made by both parties, it is clear that Nottingham City Council designated an area of their district as subject to selective licensing and this came into force on the 1 August 2018, that the Property was located in this area and no valid selective licence was held by the Respondent during the period 1 August 2018 to 31 July 2019. Section 95(3) provides a defence if a valid application has been duly made and the Tribunal is satisfied that this was not done until the 7 August 2019.

39. Section 95(1) provides that an offence under the section can be committed by a 'person having control' and/or a 'person managing'. As set out at paragraph 14 above, these terms are defined in section 263 of the 2004 Act. It is clear the rack rent in respect of the Property was paid to the Landlord's agent and remitted to the Landlord after deduction of the management fee. The defence statement denies that the Respondent had control of the Property and/or managed the property because of the role of the full managing agent (until August 2019 when the management agreement was terminated) but it is clear as owner of the Property that the Respondent falls squarely within the definition of 'person managing' set out in section 263(3)(a)(ii)

40. From the facts set out above, the Tribunal is able to determine that, subject to the defence of reasonable excuse in section 94(4), the offence in section 95(1) has been made out.

41. It is now necessary to turn to the question of whether there is a reasonable excuse for not having a licence. The Respondent has not explicitly raised the defence of reasonable excuse but has submitted that: the Respondent was not aware of the need to licence the Property until August 2019; made an application quickly once aware of the need to do so; that at all times during the applicable period the Property was fully managed by the Respondent's then agent; and that the agent failed to advise the

Respondent of the need to licence. Further, that the Respondent terminated the agency agreement in August 2019 when the need to licence and other issues came to light in August 2019.

42. Whilst the defence was not expressly referred to in the submissions on behalf of the Respondent, in *IR Management Services Limited v Salford City Council [2020] UKUT 0081 (LC)* (a case relating to HMO licensing), the Upper Tribunal (Lands Chamber) stated at paragraph 31 '…*the issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence*.' Accordingly, the Tribunal did consider whether there was a defence of reasonable excuse. In the same case, the Upper Tribunal confirmed that the relevant standard of proof to be applied was the civil standard.

43. It appears clear to the Tribunal that the Respondent was not aware of the requirement to license the Property until August 2019 and did make an application promptly once aware of the need to do so. The Tribunal is also satisfied that the Property was being managed by Robin Thomson as agent for the Respondent. Does the failure by the agent to advise the Respondent of the need to license the Property amount to a reasonable excuse?

44. It is a well established principle of agency law that instructing an agent does not in ordinary circumstances absolve a principal of responsibility for the actions or lack of necessary action by an agent. The retention of prime responsibility by the landlord in respect of housing matters (includes licensing matters) is made clear by both the Housing Act 2004 at section 263 where it defines 'person having control' and 'person managing' and Part 2 of the Housing and Planning Act 2016 which confers the power on the First tier Tribunal to make rent repayment orders where 'a landlord' has committed a relevant offence.

45. It does appear clear that a Tribunal cannot make a rent repayment order against a managing agent with no proprietary interest in a property (*Goldsbrough & Anor v CA Property Management Ltd & Ors [2019] UKUT 311 (LC)* at paragraph 31). Whilst it is possible to have every sympathy with a landlord whose agent fails to advise them of a requirement to license a property, if it were possible for a landlord to simply plead the defence of reasonable excuse in such circumstances it would not be possible for a rent repayment order to be made in favour of a tenant. This would hardly be an incentive for landlords to undertake periodic enquiries and checks to satisfy themselves that their agent is discharging their responsibilities in a diligent and conscientious manner; it is the view of the Tribunal that it is incumbent on landlords to do so.

46. Whilst there is no direct information as to the number of properties owned, the defence statement submitted on behalf of the Respondent did refer to his portfolio of properties and from the Land Registry certificate the Property here had been owned since December 2007. It is reasonable to conclude from this that he is an experienced landlord and accordingly, irrespective of failings on the part of his agent, could be expected to be aware of the regulatory environment in which his business operates.

47. In *Thurrock Council v Daoudi [2020] UKUT 209 (LC)*, the Upper Tribunal observed at paragraph 27: '*No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence'*. The Tribunal does not consider here that the facts amount to a defence of reasonable excuse and accordingly determines that a relevant offence has been committed.

<u>Was an offence committed by the landlord in the period of 12 months ending with the date the application was made?</u>

48. It is agreed by both parties that a valid application was made on the 7 September 2019 and that the selective licensing designation came into force on the 1 August 2018. The application was made on the 11 July 2020. Accordingly the Tribunal is satisfied that the offence was committed in the twelve months preceding the Application.

<u>Amount Of Rent Repayment Order</u>

49. Having decided that the requirements for the making of a rent repayment order have been met that a In *Vadamalayan v Stewart [2020] UKUT 0183 (LC)* ("*Vadamalayan*"), the Upper Tribunal decided that the starting point for fixing the amount of a rent repayment order is the full rent. There is no justification for reducing the amount ordered to be repaid by deducting landlords expenses, or mortgage costs, or for ordering repayment of only the landlords profit. The previous statutory requirement that the tribunal only award a "reasonable" sum is no longer applicable.

50. The Tribunal has found that all the requirement for the making of a rent repayment order are met, so now has to consider what order to make given that it is bound by *Vadamalayan*. We do not consider that any order we make should be affected by the conduct of the tenant. The only reference to any conduct out of the ordinary is a submission unsupported by other evidence that the First Applicant refused access to the Landlord's contractor for three weeks at the end of the tenancy. In any event, this allegation relates to a time outside the period for a rent repayment order may be ordered.

51. With regard to the conduct of the landlord, it is noted that he did make an application for a licence very speedily once aware of the need to do so. The

question of his managing agent not notifying him of the need to licence the Property is dealt with at paragraphs 44 – 46 above. There is evidence of complaints made to the managing agent by the Applicants in respect of property condition during the applicant period. Furthermore, the Council Housing Report, whilst relating to an inspection outside the applicable period, does contain an extensive list of deficiencies which appear to be of a longstanding nature and this is borne out by the photographs submitted.

52. Other than a statement relating to rental income and sums to be set against this for mortgage, insurance and a boiler repair (which following *Vadamalayan* the Tribunal cannot take into account, no details of the Respondents financial position have been submitted. If a Tribunal is to take into account a landlord's financial circumstances, then disclosure of both the capital and income / expenses position would need to be made and this has not been done.

53. The Tribunal noted that the statement that the landlord has not previously been convicted of an offence to which Chapter 4 of the 2016 Act applies but is of the view that, given all the circumstances, this should be of limited significance only.

54. The Tribunal therefore has only very limited discretion. We make a rent repayment order for the period 1 August 2018 to 31 July 2019 inclusive. A deduction of £400 is made to reflect the fact that the landlord has not been previously convicted of an offence to which Chapter 4 of the 2016 Act applies and that he made an application forthwith once aware of the need to do so but order that that sum of £5,000 be repaid by the Respondents to the Applicant by way of a rent repayment order.

## Appeal

55. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Peter Wilson
Chair
First-tier Tribunal (Property Chamber)