



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

**Case Reference** : **BIR/00FY/HMK/2020/0021**

**Property** : **Apartment 16 Nightingale House,  
Ockbrook Drive, Mapperley,  
Nottingham NG3 6AT**

**Applicant** : **Jason Oliver Leker**

**Respondents** : **James Anthony (1)  
Mapperley Management Limited (2)**

**Type of Application** : **Application by tenant for Rent Repayment Order  
Sections 40, 41, 43 & 44 of the Housing and Planning  
Act 2016**

**Tribunal Members** : **Judge T N Jackson  
Mr R Chumley-Roberts MCIEH, J.P**

**Date of Decision** : **2 September 2020**

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**DECISION**

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## **Decision**

The Tribunal makes a Rent Repayment Order against Respondent (1) in the sum of £6000, to be paid to the Applicant within 28 days of the date of this Decision.

### **Reasons for Decision**

#### **Introduction**

1. On 21<sup>st</sup> February 2020, the Applicant applied for a Rent Repayment Order stating that the Respondents had failed to license the Property as required under a Selective Licensing scheme.

#### **Background**

2. The Applicant and another entered an assured shorthold tenancy dated 8<sup>th</sup> August 2016 with Respondent (1) to occupy the Property from 13<sup>th</sup> August 2016 at a rent of £500 per calendar month.
3. Respondent (1) holds a Lease of the Property dated 30<sup>th</sup> April 2003 for a term of 999 years from 1<sup>st</sup> October 2002. The service charge year runs from 1st April to 31<sup>st</sup> March. A ground rent is payable. There is a conflict as to whether this is £125 or £175 per annum but this is not central to the issue before us.
4. Respondent (1) lives overseas and has HMRC approval to receive rental income without the deduction of tax after 1<sup>st</sup> January 2011.
5. Respondent (2) is the freehold manager of the City Heights development which comprises 6 large Houses, including Nightingale House, which form twenty individual Apartment blocks. Respondent (2) commenced services at the development on 31<sup>st</sup> December 2010 when the Right to Manage was acquired by their client City Heights RTM Company Limited.
6. Respondent (2) offers a 'Fully managed service' or alternatively a 'Find a tenant service' to leaseholders at the development. Respondent (2) has an office on the development.
7. On 1<sup>st</sup> August 2018 Nottingham City Council introduced a Selective Licensing Scheme requiring landlords to obtain a Licence in order to rent out properties within the geographical area in which the Property is located.
8. On 13<sup>th</sup> May 2020 Nottingham City Council accepted an application from Respondent (2) as agent for Respondent (1) for a Licence for the Property.

#### **Inspection**

9. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundle we did not consider it necessary to inspect the Property.

## **Hearing**

10. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. All parties provided written submissions. Having reviewed the written submissions we are satisfied that the matter is suitable to be determined without a hearing. Although the parties are not legally represented, the issues to be decided have been clearly identified in their respective Statements of case and additional documentation. These set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

## **The Law**

11. Section 41 of the Housing and Planning Act 2016 (“the 2016 Act”), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.
12. The 2016 Act applies to a number of offences including an offence committed under section 95 (1) of the Housing Act 2004, namely the control or management of a house required to be licensed under section 85 (1) of the 2004 Act but which is not so licensed.
13. Section 263 of the 2004 Act defines ‘a person having control’ and ‘a person managing’.
14. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).
15. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to an offence under section 95 (1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
16. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of the following factors:
  - 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 that Chapter of the Act applies.

## **Submissions**

### Applicant

17. The Applicant says that there has been no Selective Licence for the Property from 1<sup>st</sup> August 2018 when the requirement commenced until date of his application to the Tribunal. Respondent (2)’s only involvement in the Property was to find him as a tenant and that there was no further involvement. The Applicant says that he paid his

rent to Respondent (2) as requested by Respondent (1) to discharge the service charge. He continued to do so even though Respondent (2) had asked him to stop doing so once the service charge had been discharged. The Applicant says he attempted to deal with Respondent (1) directly by email regarding the management of the letting but approached Respondent (2) at their office on site for assistance when he was unable to contact Respondent (1).

#### Respondent (1)

18. Respondent (1) confirms that he did not apply for a Selective Licence. He says that due to his financial situation he could not afford to pay the Licence fee as that would have required defaulting on his mortgage payments for the Property. He says that he did not understand the requirements of the Selective Licensing scheme and did not know the timescale within which he had to apply and engage managing agents (being an overseas landlord).
19. He has provided copies of a generic email dated 16<sup>th</sup> March 2018 sent by the Right to Manage Company of the development to all leaseholders advising landlords of the introduction of the Selective Licensing regime. The email specifically refers to the requirement for overseas landlords to engage a managing agent to act as Licence holder. The email set out the requirements and stated that the Selective Licensing Scheme started on 1<sup>st</sup> August 2018. The email offered the opportunity to engage Respondent (2) for a fully managed service at a cost of 8% of the rent per calendar month and the Licence application would be submitted for no charge (page 52 Respondent (1) bundle). On 17<sup>th</sup> March 2018 Respondent (1) responded to the email saying that he could not afford the management fees of 8% of the rent per month as the rental income and fee would fall short of his mortgage payment (page 62 Respondent (1) bundle). He did not engage them.
20. On 6<sup>th</sup> May 2018, Respondent (2) sent an email to landlords setting out details of the application fees and the requirements for an application. It again referred to the need for overseas landlords to have a managing agent as 'licence holder'. It also referred to the consequences of failing to have a licence (page 51 Respondent (1) bundle).
21. Respondent (1) says that Respondent (2) was his 'point of reference' for his tenant, and that Respondent (2) organized and paid for all repairs and sought reimbursement from him which he paid on production of an invoice. He provides copies of emails between 2016 and 2018 in which Respondent (2) advises Respondent (1) of repair works that the Applicant has identified need to be carried out within the Property.

#### Respondent (2)

22. Respondent (2) states that since 2011, it has been engaged by Respondent (1) every few years for the 'Find a tenant' service only. Between 12<sup>th</sup> July 2016 and 12<sup>th</sup> August 2016 Respondent (1) used Respondent (2)'s 'Find a tenant service' for the Property and the Applicant was found. Respondent (2) managed the Property for one week from the move in date of 13<sup>th</sup> August 2016 and then management was handed over to Respondent (1) via an email.
23. Respondent (2) say that it had no involvement in the management of the Property from August 2016 until 12<sup>th</sup> May 2020 when, in response to the application to the Tribunal, Respondent (1) contacted Respondent (2) to engage them to fully manage the

Property and apply for a Selective Licence. This had commenced on 13<sup>th</sup> May 2020 and on this date Respondent (2), as agent for Respondent (1), submitted an application for a Selective License. Prior to 20<sup>th</sup> May 2020 Respondent (1) had not paid any lettings management fees to Respondent (2).

24. Respondent (2) says that in the 12-month period before the application to the Tribunal it had not carried out any repairs at the Property. In 2017 and 2018, when the Applicant had attended their office saying that he could not contact Respondent (1) it had assisted the Applicant by giving him contractor details. It appears that the contractors had charged Respondent (2) for such repairs the costs of which Respondent (2) sought from Respondent (1). The repairs were minor namely bath light switch; broken oven door seal; new shower bracket; new basin tap; basin mirror light cord. The exception is a new washing machine which was purchased by the Applicant and repaid by Respondent (1) by a waiver of the rent. The Applicant had organized and paid for a new washer dryer in November 2018. Respondent (2) had felt it appropriate at the time to notify Respondent (1).
25. Respondent (2) confirms that in the 12 months preceding the application to the Tribunal the Applicant paid some of his rent into Respondent (2)'s leaseholder account as the Applicant was told to do so by Respondent (1) to pay off the latter's service charge for 2019. Once the debt was paid Respondent (2) advised the Applicant to stop paying the rent to them. On numerous occasions Respondent (2) requested the Applicant's bank details to repay the rent to him. The Applicant confirms that he failed to respond. In an effort to deal with the funds sitting in its account, Respondent (2) paid the monies to Respondent (1) without any deduction or fees.
26. Respondent (2) submits that the receipt of rent to pay off service charges arrears and the receiving and passing on of rent to Respondent (1) due to the Applicant's failure to respond to a request to provide his bank details falls within the phrase 'unless the context otherwise requires' in section 263 of the 2004 Act and thus it was not 'a person having control' of the Property.
27. In the alternative, Respondent (2) submits that the background described above constitutes the defence of 'reasonable excuse' under section 95(4) of the 2004 Act as it was naively trying to do the best thing for all parties involved and received no financial benefit.

### **Deliberations**

28. We considered the applications in four stages –
  - a) Whether we were satisfied beyond a reasonable doubt that either or both Respondents had committed an offence under section 95(1) of the 2004 Act.
  - b) Whether the Applicant was entitled to apply to the Tribunal for a Rent Repayment Order;
  - c) Whether we should exercise our discretion to make a Rent Repayment Order;
  - d) Determination of the amount of any Order

Offence

Section 95 (1) of the 2004 Act

29. Section 95(1) 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 under [section 85(1) of the 2004 Act] but is not so licensed.’*

30. Section 95(2) provides that it is a defence if:

*‘at the material time,*

*a. ....*

*b. an application for a licence had been duly made in respect of the house under section 87*

*and that .....application was still effective.’*

31. Section 95(4) provides that is a defence if the person:

*‘had a reasonable excuse-*

*a. for having control or managing the house in the circumstances mentioned in subsection (1) or*

*b. ....’*

32. Section 263 of the 2004 Act provides:

*(1) In this Act ‘a 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) .....*

*(2) .....*

*(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).....*

*(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 or parts of the premises, or of the whole of the premises;*

*and includes, where those rents or other payments are received through another person as agent or trustee, that other person.*

33. Respondent (1), as lessee of the Property, was receiving, through Respondent (2), rent from the Applicant who was in occupation of the Property as a tenant. Respondent (1) was therefore a ‘person managing’ the Property.

34. Respondent (2) received rent from the Applicant to pay off Respondent (1)'s service charge and, once those were discharged, received and passed on ongoing rent payments to Respondent (1). Respondent (2) was therefore both a person having control of and managing the Property. The phrase '*unless the context otherwise requires*' in section 263(1) of the 2004 Act refers to the context of the legislative section being interpreted rather than the contextual background to a case. Respondent (2)'s submission on this point fails.
35. A Licence for the Property was required under section 85(1) of the 2004 Act. The Applicant had been a tenant of the Property from 13<sup>th</sup> August 2016 to the date of the application to the Tribunal (and thereafter) and had paid rent throughout this period as evidenced by bank transfers. There was no Licence or a duly made application for a Licence until 13<sup>th</sup> May 2020. The defence under section 95(2)(b) does not therefore apply.
36. Having regard to paragraphs 17-19 above, we determine that Respondent (1) did not have a reasonable excuse for managing the Property when it was not licensed. Lack of finances is not an adequate reason for failing to comply with the legal obligation to obtain a Selective Licence. Further, it was clear from the information contained in the emails from Respondent (2) of the timescales and the consequences of failure to comply.
37. Having regard to paragraphs 21-24 above, we determine that Respondent (2) had a reasonable excuse for managing and having control of the Property when it was not licensed. Respondent (2) had no formal arrangement with Respondent (1) in terms of managing the Property. They received no fees. They did not carry out the range of functions they provide when providing their managed lettings service. They say that they had applied for Selective Licences for over 150 other properties they manage which had been applied for and paid for prior to the introduction of the Selective Licensing Scheme on 1<sup>st</sup> August 2018. Respondent (2) had an office on site and also had a relationship with Respondent (1) as a leaseholder regarding service charges and ground rent. The level of repairs with which they assisted the Applicant was very minor.
38. The actions taken by Respondent (2) appear to us to be a genuine attempt to assist a tenant with an overseas landlord, (with whom they had an ongoing relationship as a leaseholder), who failed to communicate with his tenant rather than a formal arrangement for which they received fees and carried out a range of services. There was no financial benefit to Respondent (2) as they did not charge any fees nor make any deductions from the rent they passed over to Respondent (1). The 'informal' arrangement resulted in Respondent (1) considering that he had a 'point of reference' at the Property but without having to pay for the benefit of such a role. We find that the defence under section 95(4)(a) applies.
39. On the basis of the facts set out in paragraphs 32,34 and 35 above, we are satisfied beyond a reasonable doubt that Respondent (1) had committed an offence under section 95 (1) of the 2004 Act, namely being a person managing a house which was required to be licensed under section 85(1) of the 2004 Act but was not so licensed. An application for a Selective Licence was not duly made until 13<sup>th</sup> May 2020 when the commission of the offence ceased.

### *Entitlement of the Applicant to apply for a Rent Repayment Order*

40. We determine that the Applicant was entitled to apply for a Rent Repayment Order. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicant and the offence was committed in the period of 12 months ending with the day on which the application to the Tribunal was made, namely 21<sup>st</sup> February 2020.

### *Discretion to make a Rent Repayment Order*

41. Having considered the matter, including Respondent (1)'s written submission, we were satisfied that there was no ground on which it could be argued that it was not appropriate to make a Rent Repayment Order in the circumstances of this case.

### *Amount of Rent Repayment Order*

42. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 95(1) of the 2004 Act. Respondent (1) ceased to commit the offence on 13<sup>th</sup> May 2020 when the application for the HMO licence was duly made and which was after the Applicant had made the application to the Tribunal. The relevant period during which the offence was committed was therefore 21<sup>st</sup> February 2019 to 20<sup>th</sup> February 2020 inclusive.
43. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. During the relevant period the Applicant paid the sum of £6000 as evidenced by the bank statements submitted.
44. We had regard to the case of *Vadamalayan v Stewart and others* (2020 UKUT 0183) which concerned the calculation of a Rent Repayment Order under section 44 of the 2016 Act. The Upper Tribunal held that:

*'18. ...under the current statute, in the absence of the provision of reasonableness, it is difficult to see a reason for deducting either a fine or a financial penalty, given Parliament's obvious intention that the landlord should be liable both (1) to pay a fine or civil penalty, and (2) to make a repayment of rent.*

*19. The only basis for deduction is section 44 itself and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.*

*53. The provisions of the 2016 Act are rather more hard edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in *Parker v Waller* [2012 UKUT 0301]. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances.'*



45. We have therefore not deducted from the £6000 rent paid the costs of the expenses incurred in maintaining the Property, including repairs, service charges, ground rent and mortgage payments.

### Conduct

46. Respondent (1) has given several reasons why he did not apply for a Licence some of which conflict. He says he did not understand what was required or the timescale; that he could not afford to pay the Licence fee as that would result in him defaulting on mortgage payments; and that he could not afford to pay a management fee to a lettings agent to act as 'licence holder'. We find that Respondent (1) did understand the requirements as is evidenced by his email of 17<sup>th</sup> March 2018 but that he made a conscious and deliberate decision not to apply for a Licence due to financial constraints. We note that after redeeming the mortgage in July 2019, thus 'freeing up' the former mortgage payment of £584.98 per month, and an easing of his financial situation, he still did not seek to apply for a Licence or engage letting agents to do so.
47. Respondent (1) states that he had had no problems with the Applicant as a tenant. He refers to late payments of rent each month but we note the Applicant's email to Respondent (1) dated 5<sup>th</sup> October 2017 stating that due to a change in date of salary payment he would pay on approximately 26<sup>th</sup> of the month rather than 13<sup>th</sup>. The Applicant had no response to the email and we note that the rent was paid consistently on the new date as evidenced by the bank statements. There is limited evidence that Respondent (1) took action against the Applicant regarding alleged 'late' payments.
48. We do not find anything in the conduct of the Applicant or Respondent (1) that justifies a deduction to be made from the £6000 rent paid.

### Financial

49. Respondent (1) refers to having limited income, namely his pension and the £500 per month rent paid for the Property totaling £8817.60 per annum. After paying his mortgage payment he had an annual net income of £1805.50. In July 2019 he redeemed the mortgage. From the income Respondent (1) paid service charges (2018-£996.34; 2019-£1041.79 and 2020-£1115.30) and ground rent (using £175). After such deductions he had approximately £634, £588 and £5187 per annum net income in service charge years to 31<sup>st</sup> March 2018, 31<sup>st</sup> March 2019 and 31<sup>st</sup> March 2020 respectively.
50. The bank records submitted by Respondent (1) do not assist the Tribunal as they do not state the name of the bank, identify the account holder or state the balance available as it merely identifies transactions. Despite the Directions stating that he should provide details of his financial situation, other than this account, Respondent (1) has not provided documentary evidence of his wider financial circumstances such as capital or other assets.
51. In the absence of any evidence to the contrary, we find it improbable that Respondent (1), who lives overseas, is able to support himself, his wife and sister in law on approximately £634 and £589 per year as alleged. Further, even if that was the case, since July 2019 he has had an additional £584.98 per month disposable income. We do not find anything in Respondent (1)'s financial circumstances that justifies a deduction to be made from the £6000 rent paid.

Conviction

- 52. We have no evidence that Respondent (1) has been convicted of any housing related offences or received any financial penalties.
- 53. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.
- 54. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If Respondent (1) does not make the payment of £6000 to the Applicant within 28 days of the date of this decision, or fails to come to an arrangement for payment of the said amount which is reasonable and agreeable to the Applicant, then the latter can recover the amount in the County Court.

**Costs**

- 55. No application for costs was made by any party and we make no order as to costs.

**Appeal**

- 56. If any party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson