FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/31UJ/HMJ/2021/0011**
Property	**:**	**Flat 1, 42 Blaby Road, Leicester, LE18 4SD**
Applicant	**:**	**Adam Morris and Erin Morris**
Respondent	**:**	**Ashraf Bana (Rent my Home)**
Type of Application	**:**	**Rent Repayment Order (s.41 Housing and Planning Act 2016)**
Tribunal Members	**:**	**Tribunal Judge Craig Kelly** **Alan McMurdo MCIEH**
Date of Decision	**:**	**1 June 2022 (hearing date 19 April 2022)**

DECISION

DECISION

1. The Tribunal concludes that Mr Bana has committed an offence contrary to s.95 of the Housing Act 2004 ("the 2004 Act"). Further, the Tribunal concludes that it is appropriate to make, and hereby makes, a rent repayment order pursuant to Part 2 of Chapter 4 of the Housing and Planning Act 2016 ("the 2016 Act") in favour of Mr and Mrs Morris in the total sum of £1,093.75, such sum to be paid within 14 days of receiving this decision.

REASONS FOR DECISION

Introduction

2. This is the decision in the application made by Mr and Mrs Morris concerning Flat 1, 42 Blaby Road, for a rent repayment order pursuant to s.40 (1) of the 2016 Act.

3. By s.42(2) a tenant may apply for a rent repayment order where a person has committed an offence to which Chapter 4 of the 2016 Act applies. Such offences are detailed in s.40(3) of the 2016 Act and include the offence under s.95(1) of the 2014 Act, which is committed by a landlord in relation to housing in England.

4. S.95 of the 2004 Act states that a person commits an offence if they are "*a person having control of or managing a house which is required to be licensed under [Part 3 of the 2004 Act]*". The Part 3 requirement is known as "*selective licensing*". In brief, certain properties must be licensed by a local authority for occupation by tenants where the Local Authority declares an area subject to the selective licensing regime.

5. This case concerns an alleged failure to seek such a license where the property subject to the proceedings had been let to tenants.

The Facts

6. Mr and Mrs Morris are the applicants and present tenants of the property, Flat 1, 42 Blaby Road, Wigston, Leicestershire, LE18 4SD ("the Property"). The relevant local authority for the area in which the Property is situated is Wigston and Oadby Borough Council ("the Local Authority").

7. By a written tenancy agreement between Mr and Mrs Morris and Mr Ashraf Bana, dated 19 March 2021, Mr and Mrs Morris secured an assured shorthold tenancy from that time for a period of six months at a rent of £625 per month. The tenancy was renewed by a subsequent written agreement, between the same parties, dated 19 September 2021, this time, for a twelve-month term and for the same rent of £625 per month. The rent was payable by the 19th of each month and in advance.

8. The Property was managed on a day-to-day basis by Reliance Properties Limited ("Reliance").

9. There was no dispute that the rent payable under the tenancy agreements had been paid and continues be paid by Mr and Mrs Morris as required.

10. The Local Authority served a Notice of Intention to issue a financial penalty upon Reliance pursuant to paragraph 1 of Schedule 13A of the 2004 Act dated 13 November 2021 ("The Notice of Intent"). The Notice of Intent identified that the Local Authority considered Reliance to be in breach of s.95 of the 2004 Act and provided a period of 28 days to make representations. By a notice dated 14 October 2021, the Local Authority issued a "Final Notice to Issue a Penalty" pursuant to s.249A of the Housing Act 2004 ("the Penalty Notice"). The Penalty Notice alleged that Reliance had committed an offence pursuant to s.95 of the 2004 Act, for controlling or managing a house which was required to be licensed but which was not. The Penalty Notice imposed a penalty of £6,000 upon Reliance.

11. The Local Authority subsequently withdrew the Penalty Notice upon challenge by Reliance, because it subsequently accepted that an application had been made in respect of the Property on 11 October 2021, but which it had overlooked when issuing the Penalty Notice.

12. Mr and Mrs Morris were encouraged by the Local Authority to make an application for a rent repayment order in their capacity as tenants.

The parties' cases and discussion

Overview of positions

13. The applicants sought a repayment of rent for the period of 19 March 2021 to 18 January 2022 (i.e. ten months, at £625, being £6,250). They could potentially have sought a lengthier period of claim, although they recognised that they had limited their claim accordingly by reference to the content of their statements of case.

14. The respondent to these proceedings is Mr Ashraf Bana. In his statements of case, prepared by his letting agent, Reliance Properties Limited ("Reliance"), Mr Bana's position, in essence, was said to be:

    a. that no evidence substantiating a basis of offence had been established that would permit the Tribunal to make a rent repayment order;

    b. that the landlord had taken all reasonable steps in ensuring good property management and tenant welfare, as evidenced by a number of safety inspection certificates procedure to the Tribunal;

    c. that various repairs identified as required by the tenants had been properly carried out by the landlord; and

    d. that the license required for letting a property in a selective licensing area had not been issued in time by the Local Authority.

15. There were numerous other bases of defence advanced in relation to other potential offences, although none of those were relevant because the offences to which they related had not been relied upon in the proceedings. There would appear to have been some confusion on the part of those submitting the respondent's statements of case as to what was specifically being alleged.

Who was the landlord and who managed and/or controlled the Property?

16. During the course of submissions, Mr Tayub, of Reliance, informed the Tribunal that the freeholder of the Property was a company called "Propcor Limited" ("Propcor"). It was said by Mr Tayub that he thought that company was the landlord, not Mr Bana. When the Tribunal queried why Mr Bana was said in the written agreements to be the landlord, Mr Tayub advised that his name was simply left on their computer systems and that the payments for the rent, after initially being paid to Reliance, we forwarded on to Propcor. Accordingly, Mr Rayub said, the landlord was Propcor.

17. The importance of properly identifying the landlord is that, in *Rakusen -v- Jepsen & others [2021] EWCA Civ 1150*, the Court of Appeal held that the proper construction of s. 40(2)(a) of the 2016 Act is that a rent repayment order may only be made against the tenant's immediate landlord and not a superior landlord[1].

18. Furthermore, the correct identity of the landlord was not the claim initially being commenced against three respondents, Mr Bana, Propcor and Reliance, it was ultimately only pursued against Mr Bana. This may, in part, have been the result of the observations of Tribunal Judge Jackson to the parties by email to the parties on 22 December 2021, in which it was noted that the Court of Appeal's decision in *Rakusen*, that a rent repayment order could only be made against an (immediate?) landlord. On 22 December 2021, Reliance confirmed to Mr and Mrs Morris in email that their landlord was indeed Mr Bana. Later that same day, Mr and Mrs Morris confirmed to the Tribunal that they wished to proceed solely against Mr Bana.

19. The respondent had not suggested in his statement of case that Mr Bana was not the landlord and the written tenancy agreements clearly identified Mr Bana as the landlord on the face of the documents. There was no suggestion from either party that the written agreements were a sham, contrived to set out some position not reflected by the written tenancy agreement. It is entirely possible to have a tenancy relationship between Mr Bana and Mr and Mrs Morris, whilst payments are made ultimately to Reliance (as agent for Mr Bana, and/or Propcor) with the rent being paid by Reliance to Propcor, the latter being what Mr Tayub suggested was happening. Given that Reliance is clearly acting on behalf of Mr Bana, given that he was the respondent to these proceedings and Mr Tayub confirmed this at the outset of the hearing, the Tribunal is satisfied beyond reasonable doubt that the written tenancy agreement properly records the terms of the tenancy between Mr Bana and Mr and Mrs Morris.

[1] It is understood that, at the time of preparing this judgment, the Supreme Court has given permission to appeal in the *Rakusen* case, although the outcome of any appeal before that court is unlikely to affect this decision in any way.

A selective licensing area?

20. The next issue, is whether the Property was within an area for which selective licensing was required and if so, what period was the selective licensing requirement in force for.

21. There was no evidence provided in the bundles (save perhaps, for the application to register under the selective licensing scheme) that the Property was indeed subject to the requirement to licence under the selective licensing regime. During the course of the hearing, however, Mr and Mrs Morris forwarded a link the Local Authority's website (https://www.oadby-wigston.gov.uk/pages/selective_licensing_scheme) from which it was apparent that:

    a. the Local Authority had designated South Wigston as an area subject to the selective licensing regime with effect from 5 May 2020, implemented by designation order dated 5 February 2020; and

    b. that Blaby Road is set out within Annex B of the designation order.

22. Accordingly, there was a requirement to seek a license for the Property, where it was to be let to tenants, with effect from 5 May 2020.

23. There was no dispute that the first tenancy of the Property commenced on 19 March 2019 and continues to this date. Accordingly, come 5 May 2020, there was a requirement to register.

24. It was accepted by Mr Tayub that there had been a failure to make an application for a license with the Local Authority until 11 October 2021, following a notification to Reliance, it was said, of a notice setting out the obligation to seek a license being received from the local council on 13 September 2021.

25. Unfortunately, it would seem due to a backlog at the local council, the application had not been concluded at the date of the Tribunal's hearing. In any event, the Tribunal accepts that the document provided dated 11 October 2021, which records an application being made on that date by Shamila Umar, who is said to be a joint owner of Propcor with Mr Bana, does reflect the fact that an application for selective licensing of the Property was first made on that date.

26. Accordingly, the Tribunal is of the view that Mr Bana has committed the offence under s.95 of the 2004 Act and that the Tribunal does therefore have the jurisdiction to make a rent repayment order.

What is the position of knowledge?

27. Mr Tayub informed the Tribunal that he was unaware (and by extension, Mr Bana was likely to have been unaware) that the Property was subject to a selective licensing regime. Ultimately, however, the High Court has held that knowledge of the commission of an offence under s.95(1) is irrelevant – it is a strict liability offence (*R. (on the application of Mohamed) -v- Walthan Forest LBC and R. (on*

the application of Mohamed) -v- Wimbledon Magistrates Court [2020] EWHC 1083 (Admin)). Accordingly, the absence of knowledge of the requirement to register makes no difference – the offence is still committed if the required factual elements of the offence are proven.

28. The ignorance of the requirement to seek a license may, however, have an impact upon the level of any rent repayment order that might be made.

Does the tribunal have the jurisdiction to make a rent repayment order?

29. The Tribunal can only make a rent repayment order where it is satisfied, beyond reasonable doubt, that the landlord has committed an offence within s.40(3) of the 2016 Act. One such offence, and that alleged in this case, is that of "*controlling*" or "*managing*" an unlicensed house contrary to s.95(1) of the 2004 Act, save of course, that by s.40(2) of the 2016 Act the provisions are deemed to relate to properties in England.

30. Having concluded, as we have, that the landlord of the Property is Mr Bana, consistent with the terms of the tenancy agreement and that Reliance was instructed to attend at the Tribunal and make representations on behalf of Mr Bana, we are satisfied beyond reasonable doubt that Mr Bana was engaged in the "*control*" or "*management*" of the Property for the purposes of s.95 of the 2004 Act.

31. The are two further considerations before determining whether, in principle, a rent repayment order should be made:

    a. s. 41(2) permits the making of an order only where the applicant tenant was the tenant at the time of the offence – there is no dispute about that in this case and the requirement is satisfied;

    b. s.41(2)(a) the offence concerned must have been committed in the period of 12 months ending with the day on which the application is made – in this case, there is no difficulty here, because the offence was committed on 20 May 2020 and continued until 11 October 2021, and the application to the Tribunal was made on 20th December 2021

Should the Tribunal make a rent repayment order?

32. Section 43(1) of the 2016 Act provides that the Tribunal *may* make a rent repayment order, it is not obliged to do so.

33. Having regard to the legislative intent behind the introduction of the rent repayment order, namely, to deter and discourage landlords from committing certain offences, and having regard to the absence of knowledge of the commission of the offence being a relevant factor, the Tribunal concludes that it is appropriate to make a rent repayment order.

For what sum should the order be made?

34. Section 44 of the 2016 Act states (insofar as relevant):

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.

35. By s95(3) of the 2004 Act, a defence exists to proceedings brought in relation to an offence under s.95 from the point at which an application for a license is made. Given that an application was made in this case on 11 October 2021, the period with which the Tribunal is concerned is that for which the offence was committed, in this case, between 19 March 2021 until 11 October 2021.

36. By s.44(2), the amount of any rent repayment order "*must relate*" to the rent paid within the period of the offence and must not exceed the rent paid in this period (s.44(3)(a). No issue of universal credit arises in this case.

37. Mr and Mrs Morris have applied for an order for the period 19 March 2021 to 13 January 2022; which at £625 per month rent paid, amounted to £6,875. This is the point from which the Tribunal starts to consider what sum to award. As noted above, Mr Bana has a defence to the relevant offence being committed as at 11 October 2021, following the application for a license, and so the maximum period the Tribunal can consider is between 19 March 2021 and 11 October 2021. Given that the rent was paid in advance for each month, this means that 7 months rent had been paid, amounting to £4,375.

38. The Tribunal must additionally have regard to the factors in s.44(4), namely, the conduct of the landlord, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which the rent repayment regime applies. However, in this case, there was no evidence from any of the parties that go to anything other than the landlords' general conduct and

then, it was evidence given by Mr and Mrs Morris and Mr Bana (though his statements of case) which was favourable to Mr Bana. Niether was any evidence offered that Mr Bana had previous convictions.

39. Mr Bana's position was that he had had been a good landlord, having carried out relevant safety checks at the start of the tenancy and that he always promptly attended to issues that Mr and Mrs Morris might have had. Indeed, despite being invited to identify any failures by Mr Bana, Mr and Mrs Morris were unable to do so, and confirmed that he has been a good landlord.

40. The respondent produced to the Tribunal a number of documents in support of the proposition that he was a good landlord, including an energy performance certificate (undated, but valid until 25 September 2024), a domestic electrical installation certificate (dated 10 September 2021), a fire safety risk assessment (dated 28 January 2022). In any event, there were no conduct issues raised specifically between the parties, whether in their statement of case or otherwise save for reference to the good conduct of the respondent.

41. Accordingly, there were no aggravating factors evidenced or relied upon in this case vis-à-vis Mr Bana and indeed, he appeared to be a good landlord.

42. As to the failure to apply for a license, Mr Bana's position was essentially that he had engaged the services of Reliance, to carry out the day to day management of the Property. He has done what he could, in effect, to ensure compliance with the requirements for management. Not being a professional landlord is not, in itself, a mitigating factor, and such has been clearly recognised by the Upper Tribunal in *Vadamalayan -v- Stewart [2020] UKUT 183 (LC)*. However, taking steps to seek advice and assistance with complying with all relevant legal requirements, which is a reasonable inference from the instruction of a professional managing agent in a different matter.

43. The Tribunal does not start from a position that the maximum possible sum is payable and instead adopts a holistic assessment of the s.44 factors and circumstances of the case, including the degree of culpability of Mr Bana, which in concludes is relatively low. This is an approach consistent with the approach in *Williams -v- Parmar & Others [2021] UKUT 244 (LC)*. Professional agents were instructed, they applied as soon as they became aware of the need to seek a license, and Mr Bana has otherwise been a good landlord to Mr and Mrs Morris.

44. Further, the Tribunal takes account of the policy objectives behind the legislation and the need to ensure landlords are deterred from simply not making applications in the hope that any potential rent repayment order amounts to less than the relevant licensing fees.

45. Accordingly, the Tribunal has concluded that a reasonable award would be 25% of the total rent paid in the relevant period for which the offence was committed, resulting in an award of £1,093.75, such sum to be paid to Mr and Mrs Morris within 14 days of receiving this decision.

Judge C Kelly