



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

Case Reference : **LON/00AH/HMA/2013/0005**

Property : **958 Thornton Road, Thornton Heath, Surrey, CR7 7PG**

Applicant : **London Borough of Croydon**

Respondent : **Mr Adedokun Odukoya**

Type of Application : **Rent Repayment Order (Housing Benefit)**

Tribunal Members : **Mrs V.Barran
Mr T. Sennett MA FCIEH
Mrs J.A. Hawkins BSc MSc**

Date and venue of Hearing : **24 July 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **6 August 2013**

DECISION

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RENT REPAYMENT ORDER

1. The Tribunal orders Mr Adedokun Odukoya to repay Housing Benefit to the London Borough of Croydon received in connection with occupation of parts of the property at 958 Thornton Road, Thornton Heath, Surrey, CR7 7PG in the sums of

£4,062.52 re: Mr Leroy Emmanuel

and

£ 2,236.86 re: Miss Olayinka O Ogunduyile.

REASONS

INTRODUCTION

2. By an application dated 30 April 2013, the London Borough of Croydon sought a Rent Repayment Order (“RRO”) under s.73 (5) of the Housing Act 2004 (“the Act”). The order sought is in respect of Housing Benefit paid to the Respondent, Mr Adedokun Odukoya, in connection with occupation by two tenants of the Attic room/Ground floor front room and the First floor front left hand room and communal facilities at the property.
3. The Tribunal issued directions to enable the parties to prepare for a hearing that took place on 24 July 2013. The council submitted a bundle of documents to the tribunal and to Mr Odukoya by the date specified in directions. This included correspondence between the parties, Official Copy of Land Registry title to the property, schedule and computer printouts of Housing Benefit, two assured shorthold tenancies, and Notice of Intended Proceedings. No bundle had been received from Mr Odukoya.
4. The council was represented at the hearing by Ms Carole Woolnough EHO, HMO team leader, Mr Don Stubbs, Enforcement Officer and Ms Miriam Bradley HMO Licensing Officer.
5. Mr Odukoya attended in person. He had made written submissions in letters to the Council which were included in their bundle and which we took into account. Mr Odukoya stated he had not received the tribunal’s directions. We checked these were sent to the correct address and noted he had received the council’s bundle. During the course of the hearing he asked us to consider a bundle of his documents, but we declined¹ at this late stage because his main submission was a letter already included in the council’s bundle, the remaining documents did not appear to be relevant to his case and it would be unfair to the council who objected to the inclusion of late evidence.

¹ Rule 8 The Tribunal Procedure (FTT)(PC) Rules 2013

6. We also declined to deal with the question of the council's costs which had been included in the bundle but had not formed part of the application or been referred to in the council's statement. It would not be fair to expect Mr Odukoya to make submissions on these costs at the last moment.
7. We did however give parties opportunity to put oral evidence and submissions to us and to ask and answer questions of each other. We would like to thank all those attending for their assistance.
8. This tribunal was formerly known as the Residential Property Tribunal. References in square brackets [] are to page numbers of the council bundle.

THE LAW

9. The law relating to RROs is primarily found in sections 73 and 74 of the Act, but there are a number of other sections relevant here including ss55 - 61, 72, and Licensing of HMOs (Prescribed Descriptions) (England) Order 2006/371 and Licensing and Management of HMOs and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373.
10. If a house in multiple occupation (HMO) should be licensed but is not licensed, the person having control of or managing the HMO commits a criminal offence. (s.72 (1)). There are defences, including that there is an effective application for a licence or that the person had a reasonable excuse (s.72 (4) & (5)).
11. One consequence of a failure to licence an HMO is that on application (in this case from the local housing authority) a tribunal may make a RRO under section 73(5). If HB has been paid, the "appropriate person" may be ordered to repay this to the local housing authority. If a conviction has been secured (in the magistrate's court) under s 74(2) the Tribunal *must* make a RRO, with some exceptions including where there are exceptional circumstances, where the total rent is less than the HB and falling outside the 12 month period *ending with the date of the notice of intended proceedings*.
12. Where (as here) the local housing authority applies for a RRO, the Tribunal *must* be satisfied of the matters set out in s.73 (6) and (7) of the Act.
13. Sections 73 and 74 of the Act are annexed to this decision.

THE ISSUES

14. (a) Was the property an HMO that is required to be licensed?

(b) Was Mr Odukoya the person having control of or managing an HMO that is required to be licensed?

(c) Was Mr Odukoya the appropriate person?

(d) Had Mr Odukoya in the 12 months prior to 22 March 2013 committed an offence under s 72(1) – failure to licence an HMO?

(e) Had Housing Benefit been paid in respect of the property during periods when an offence was being committed and how much?

(f) Had a Notice of intended proceedings been served correctly?

(h) If a RRO is made, the amount to be repaid.

FINDINGS

Was the property an HMO that is required to be licensed?

15. We heard at the hearing that all but four wards in the London Borough of Croydon had been designated as areas of additional licensing in September 2010. The property was in such a designated area (Thornton Heath). All properties occupied by three or more people in two or more households are now licensable regardless of the number of storeys. We would have preferred to have had written confirmation of this in the application or in the council's bundle but we were referred to the council's website and we accepted Ms Woolnough's evidence on this and noted that this information is clearly within the public domain.
16. Mr Odukoya was not sure of the dates when various tenants were in occupation, but told us generally he let to four people during the period in question (see below). We found his oral evidence to be somewhat vague and at times inconsistent. For example he claimed that room 1 was used as an office, yet agreed that Ms Ogunduyile had moved into that room and we saw her name against Room 1 on the list of 6 occupiers completed by another tenant in a statutory form for the council on 15 July 2012.
17. The evidence from the council was sparse and again unsigned and undated. Mr Stubbs explained he had extrapolated his statement from the documents he had prepared for the court. We went through the visit dates [9, 10] in some detail with the council officers attending and on balance we were satisfied that during the period for which the council were seeking an RRO (26 March 2012 to 10 March 2013) there had been at least three occupants in different households in the property so that it was an HMO that was required to be licensed under the council's additional licensing scheme. After March 2013 we accepted from Mr Odukoya there were less than three occupants left.

Was Mr Odukoya the person having control of or managing an HMO that is required to be licensed?

18. We were satisfied that the council established that Mr Odukoya was the freeholder and was the person who received rents from persons in occupation of an HMO in accordance with the definition in section 263 of the Act. The evidence for this was derived from the assured shorthold tenancies and from the housing benefit payment records for Mr Emmanuel. Also the form listing occupiers referred to above and signed by another tenant, gave Mr Odukoya as the person to whom rent was paid and that he was not an agent for another person. In addition in his written and oral representations to the Tribunal, although he explained he used various agents, Mr Odukoya himself accepted that he let rooms and that he had owned the house since early 2008 (albeit that the registration at the Land Registry had not occurred until June 2008). Section 263 does not preclude the use of agents. We found that Mr Odukoya met the statutory definition of a person having control of or managing an HMO that is required to be licensed.

Was Mr Odukoya the appropriate person?

19. The statutory definition of the appropriate person differs slightly from that of the person managing an HMO. Under section 73(10) there is a requirement for the person *to be entitled to receive on his own account* periodical payments (in this case rent) in connection with occupation at the HMO. No evidence was put that Mr Odukoya received the rents on behalf of another. We found Mr Odukoya was the appropriate person.

Had Mr Odukoya in the 12 months prior to 22 March 2013 committed an offence under s 72(1) – failure to licence an HMO?

20. The tribunal must be satisfied under s 73(6)(a) that an offence was committed *at any time within* the period ending with the date of the notice of intended proceedings i.e. 23 March 2012 – 22 March 2013 (the maximum relevant period).

21. We accepted the court report from DMH Stallard [18] and found that following a guilty plea, the respondent was convicted at Croydon Magistrates Court of an offence under section 72 of the Act (failure to licence an HMO). We note a fine of £5,000 with victim surcharge of £15 was imposed and full costs of £2,065 awarded. Mr Odukoya had written that he intended to appeal but we saw no evidence of an actual appeal.

22. The summons referred to a period of 18 June 2012 to 19 December 2012, but as explained above from the evidence of the councils inspection we were satisfied also that the house continued to be an unlicensed HMO until 10 March 2013.

23. The council had sent an HMO licensing pack to Mr Odukoya with an application form on 26 June 2012, and they informed us orally that they had previously corresponded with him on the need for a licence. Two

reminders were sent on 13 August and on 7 September 2012. There had been no application for a licence for the property.

24. We found that Mr Odukoya in the 12 months prior to 22 March 2013 had committed an offence under s 72(1) – failure to licence an HMO.

Had Housing Benefit has been paid in respect of the property during periods when an offence was being committed? How much?

25. Although section 73(6) (a) provides the tribunal must be satisfied that Mr Odukoya had committed an offence *at any time* within the 12 months ending with the notice of Intended Proceedings, s 74 (6) (a) requires the tribunal to take into account the total amount of relevant payments *...during any period during which it appears to the tribunal that an offence was being committed*".
26. We bore in mind that Mr Odukoya had pleaded guilty for the period 18 June 2012 to 19 December 2012. Our findings above were that during the period for which the council were seeking an RRO (26 March 2012 to 10 March 2013) there had been at least three occupants in different households in the property so that it was an HMO that was required to be licensed.
27. We found one questionable amount (£11.86) which the council conceded because the period appeared to commence before the valid start date of 23 March 2012. (s.74 (8) (a)).

Had a Notice of intended proceedings been served correctly?

28. From the signed witness statement of Mr A.M.Denyer we found that the Notice of Intended Proceedings was served by second class post on Mr Odukoya at his home address which he acknowledged as correct to us, on 22 March 2013 and that the requirements of section 73(7) were satisfied. Of note is that the schedule of HB payments showing how the amount of repayment sought £6,782.24 was calculated was annexed. Although he wrote to the council that his tenants were in arrears, Mr Odukoya never challenged the accuracy of the HB set out in the schedule until the hearing when he alleged the arithmetic was inaccurate. We checked it and did not find it inaccurate.

If a RRO is made what amount should be repaid?

29. We examined whether there were any other exceptions (s 74 (3) and (4)) to the statutory requirement for us to make a RRO for the full amount (s 74 (2)).
30. The council asked us to rely on the unsigned schedule of HB payments prepared by a HB Manager not present at the hearing. It was with some reluctance that we accepted from the schedule [16, 17] together with the oral evidence and the somewhat impenetrable computer printouts

prepared as exhibits for the criminal proceedings, that HB has been paid in respect of the property for the amounts stated and on the dates given.

31. Mr Odukoya stated that the court judgement was too harsh, that no income has been coming in and the mortgage still had to be paid on the property. The tenants left were “council tenants” and he was misled by the council into giving accommodation to individuals who later turned out to be problematic and unmanageable. Multiple punishments were not fair.
32. We noted that HB payments were made to Mr Odukoya directly for Mr Leroy Emmanuel, but to Ms Ogunduyile herself. Mr Odukoya stated that he had not received the benefit of all the HB paid to Ms Ogunduyile because she had sometimes failed to pay the full rent and Mr Emmanuel had not paid the shortfall between the HB and the actual rent – some £63.41 per month. He said the tenants paid the electricity themselves and it was metered. He paid water rates and council tax for the house.
33. We had some sympathy with Mr Odukoya for the difficulties he was encountering with Mr Emmanuel and noted he has engaged solicitors to gain possession. He intends to rent the property to one family in future. He told us he was suffering hypertension.
34. However he also told us that he owned 10 properties, nine in London and the South East and one in Merseyside. We saw no concrete evidence of his financial circumstances, such as details of income or outgoings, but we do know that he had the right to receive considerable rental income from the property during the relevant periods. If a tenant is in arrears a landlord can seek legal redress.
35. We did consider we should heed Mr Odukoya’s argument that if he had not received HB from Ms Ogunduyile he should not be required to repay it. He did not give detailed evidence but we were convinced by his plea that she had paid no rent since the end of January. The end date for the RRO for her is given as 10/03/13 so we determined it would be fair to reduce the total amount by three fortnightly payments of £ 157 falling from 28 January to 10 March 2013. Thus in accordance with the exception envisaged by section 74(3) we reduced the amount of RRO relating to HB paid to Ms Ogunduyile by a further £471.00.
36. RROs are both an enforcement tool and a means of repaying Housing Benefit (HB) to a local housing authority (as in this case) or rent to a tenant, when a landlord fails to license an HMO. They are also intended to prevent exploitation of public resources by those who have acted in breach of statutory requirements. Mr Odukoya had pleaded guilty to the offence of which he was convicted.
37. We considered Mr Odukoya’s argument that multiple punishments were not fair. The maximum fine is £20, 0000 and the fine imposed here (£5,000) was well below that. The statutory scheme provides for both criminal and civil sanctions. Mr Odukoya’s is a professional landlord and on balance we do not consider there are exceptional circumstances in this case so that we should depart from the “default” position of ordering full repayment as required by s74 (4) other than under the other statutory exceptions as explained above (paragraphs 27 and 35).

Conclusion

38. For the reasons given above we are satisfied that a Rent Repayment Order should be made, for the full amount claimed for Mr Emmanuel but for less than claimed for Ms Ogunduyile. We determine the amount of Housing Benefit to be repaid to the council by Mr Odukoya for the period 26 March 2012 to 27 January 2013 as follows:

£ 4,062.52 re Mr Emmanuel

£2,707.86

- £11.88

- £471.00

£2,224.98 re Ms Ogunduyile

Judge: V. Barran

Date: 6 August 2013

73 Other consequences of operating unlicensed HMOs: rent repayment orders

- (1) For the purposes of this section an HMO is an “unlicensed HMO” if—
- (a) it is required to be licensed under this Part but is not so licensed, and
 - (b) neither of the conditions in subsection (2) is satisfied.
- (2) The conditions are—
- (a) that a notification has been duly given in respect of the HMO under section 62(1) and that notification is still effective (as defined by section 72(8));
 - (b) that an application for a licence has been duly made in respect of the HMO under section 63 and that application is still effective (as so defined).
- (3) No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of—
- (a) any provision requiring the payment of rent or the making of any other periodical payment in connection with any tenancy or licence of a part of an unlicensed HMO, or
 - (b) any other provision of such a tenancy or licence.
- (4) But amounts paid in respect of rent or other periodical payments payable in connection with such a tenancy or licence may be recovered in accordance with subsection (5) and section 74.
- (5) If—
- (a) an application in respect of an HMO is made to a residential property tribunal by the local housing authority or an occupier of a part of the HMO, and
 - (b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),
- the tribunal may make an order (a “rent repayment order”) requiring the appropriate person to pay to the applicant such amount in respect of the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

Housing Act 2004 (c. 34)

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- (6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters—
- (a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),
 - (b) that housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO during any period during which it appears to the tribunal that such an offence was being committed, and
 - (c) that the requirements of subsection (7) have been complied with in relation to the application.
- (7) Those requirements are as follows—
- (a) the authority must have served on the appropriate person a notice (a “notice of intended proceedings”)—
 - (i) informing him that the authority are proposing to make an

application under subsection (5),
(ii) setting out the reasons why they propose to do so,
(iii) stating the amount that they will seek to recover under that subsection and how that amount is calculated, and
(iv) inviting him to make representations to them within a period specified in the notice of not less than 28 days;
(b) that period must have expired; and
(c) the authority must have considered any representations made to them within that period by the appropriate person.
(8) If the application is made by an occupier of a part of the HMO, the tribunal must be satisfied as to the following matters—
(a) that the appropriate person has been convicted of an offence under section 72(1) in relation to the HMO, or has been required by a rent repayment order to make a payment in respect of housing benefit paid in connection with occupation of a part or parts of the HMO,
(b) that the occupier paid, to a person having control of or managing the HMO, periodical payments in respect of occupation of part of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO, and
(c) that the application is made within the period of 12 months beginning with—
(i) the date of the conviction or order, or
(ii) if such a conviction was followed by such an order (or vice versa), the date of the later of them.

(9) Where a local housing authority serve a notice of intended proceedings on any person under this section, they must ensure—
(a) that a copy of the notice is received by the department of the authority responsible for administering the housing benefit to which the proceedings would relate; and
(b) that that department is subsequently kept informed of any matters relating to the proceedings that are likely to be of interest to it in connection with the administration of housing benefit.

(10) In this section—

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“the appropriate person”, in relation to any payment of housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation;

“housing benefit” means housing benefit provided by virtue of a scheme under section 123 of the Social Security Contributions and Benefits Act 1992 (c. 4);

“occupier”, in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence or otherwise (and “occupation” has a corresponding meaning);

“periodical payments” means periodical payments in respect of which housing benefit may be paid by virtue of regulation 10 of the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971) or any corresponding provision replacing that regulation.

(11) For the purposes of this section an amount which—
(a) is not actually paid by an occupier but is used by him to discharge the whole or part of his liability in respect of a periodical payment (for example, by offsetting the amount against any such liability), and
(b) is not an amount of housing benefit,
is to be regarded as an amount paid by the occupier in respect of that periodical payment.

74 Further provisions about rent repayment orders

(1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).

(2) Where, on an application by the local housing authority, the tribunal is satisfied—

(a) that a person has been convicted of an offence under section 72(1) in relation to the HMO, and

(b) that housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO,

the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority an amount equal to the total amount of housing benefit paid as mentioned in paragraph (b).

This is subject to subsections (3), (4) and (8).

(3) If the total of the amounts received by the appropriate person in respect of periodical payments payable as mentioned in paragraph (b) of subsection (2) (“the rent total”) is less than the total amount of housing benefit paid as mentioned in that paragraph, the amount required to be paid by virtue of a rent repayment order made in accordance with that subsection is limited to the rent total.

(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.

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(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.

This is subject to subsections (6) to (8).

(6) In such a case the tribunal must, in particular, take into account the following matters—

(a) the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);

(b) the extent to which that total amount—

(i) consisted of, or derived from, payments of housing benefit, and

(ii) was actually received by the appropriate person;

(c) whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;

(d) the conduct and financial circumstances of the appropriate person; and

(e) where the application is made by an occupier, the conduct of the occupier.

(7) In subsection (6) “relevant payments” means—

(a) in relation to an application by a local housing authority, payments of housing benefit or periodical payments payable by occupiers;

(b) in relation to an application by an occupier, periodical payments payable by the occupier, less any amount of housing benefit payable in respect of occupation of the part of the HMO occupied by him during the period in question.

(8) A rent repayment order may not require the payment of any amount which—

(a) (where the application is made by a local housing authority) is in respect of any time falling outside the period of 12 months mentioned in section 73(6)(a); or

(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier’s application under section 73(5);

and the period to be taken into account under subsection (6)(a) above is restricted accordingly.

(9) Any amount payable to a local housing authority under a rent repayment order—

(a) does not, when recovered by the authority, constitute an amount of housing benefit recovered by them, and

(b) until recovered by them, is a legal charge on the HMO which is a local land charge.

(10) For the purpose of enforcing that charge the authority have the same powers and remedies under the Law of Property Act 1925 (c. 20) and otherwise as if they were mortgagees by deed having powers of sale and lease, and of accepting surrenders of leases and of appointing a receiver.

(11) The power of appointing a receiver is exercisable at any time after the end of the period of one month beginning with the date on which the charge takes effect.

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(12) If the authority subsequently grant a licence under this Part or Part 3 in respect of the HMO to the appropriate person or any person acting on his behalf, the conditions contained in the licence may include a condition requiring the licence holder—

(a) to pay to the authority any amount payable to them under the rent repayment order and not so far recovered by them; and

(b) to do so in such instalments as are specified in the licence.

(13) If the authority subsequently make a management order under Chapter 1 of Part 4 in respect of the HMO, the order may contain such provisions as the authority consider appropriate for the recovery of any amount payable to them under the rent repayment order and not so far recovered by them.

(14) Any amount payable to an occupier by virtue of a rent repayment order is recoverable by the occupier as a debt due to him from the appropriate person.

(15) The appropriate national authority may by regulations make such provision as it considers appropriate for supplementing the provisions of this section and section 73, and in particular—

(a) for securing that persons are not unfairly prejudiced by rent repayment orders (whether in cases where there have been over-payments of

housing benefit or otherwise);

(b) for requiring or authorising amounts received by local housing authorities by virtue of rent repayment orders to be dealt with in such manner as is specified in the regulations.

(16) Section 73(10) and (11) apply for the purposes of this section as they apply for the purposes of section 73.