



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

Case Reference : **LON/00AG/HMF/2019/0025**

Property : **Flat 50 Troutbeck, Albany Street,
London, NW1 4EH**

Applicant : **(1) Li Qi Ming
(2) Jianan Jiang
(3) Jiangrui Wan**

Representative : **Justice for Tenants**

Respondent : **Mercy Agbeka**

Representative : **In Person**

Type of Application : **Rent Repayment Order**

Tribunal : **(1) Judge Amran
Vance
(2) Mr T Sennett,
FCIEH**

**Date and Venue of
Hearing** : **11 November 2019;
10 Alfred Place, London WC1E 7LR**

Date of Decision : **23 December 2019**

DECISION

NB: The relevant provisions in the Housing Act 2004 (“the 2004 Act”) and the Housing and Planning Act 2016 (“the 2016 Act”) are set out in an Appendix to this decision.

Decision

1. This application for a Rent Repayment Order (“RRO”) is dismissed because the applicants have failed to satisfy us, beyond reasonable doubt, that the respondent committed an offence under section 72(1) of the 2004 Act,

Background

2. The respondent, Ms Agbeka, is the long leasehold owner Flat 50 Troutbeck, Albany Street, London, NW1 4EH (“the Flat”). She was registered as the leasehold proprietor on 19 April 2002, under title number NGL808795, having acquired her interest in the Flat through the Right to Buy legislation. The freehold owner of the Flat is London Borough of Camden.
3. By an agreement dated 16 September 2019, Ms Agbeka, as landlord, granted a tenancy of the Flat to the applicants, to commence on 16 September 2017, for a term of 12 months. The rent payable under the agreement was in the sum of £565 per week, with an advance payment due of £14,689.98, and six monthly thereafter. A deposit of £3,390 was also payable. The agreement was signed by The Cloister, letting agents instructed by Ms Agbeka. The applicants paid the deposit and rent to The Cloister. We are informed that all of the applicants were students from China, who have now returned to China.
4. The applicants seek a RRO under s.41 of the 2016 Act, on the basis that during the period of their occupation, the Flat was required to be licensed as a House in Multiple Occupation under Camden Council’s additional licensing scheme, but was not so licensed.
5. The applicants’ application was received by the tribunal on 25 June 2019. Directions were issued by the tribunal on 28 June 2019 that required Ms Agbeka to provide a bundle of documents for use at the hearing of the application, by 23 August 2019. She did not do so.

The Hearing

6. The application was heard by the tribunal on 11 November 2019. The respondent attended that hearing and was represented by her husband, Mr Newton-Mensah. The applicants were represented by Mr McClenahan of Justice for Tenants.
7. At the start of the hearing we pointed out to Mr McClenahan that the application form was only signed by Jianan Jiang. We directed that we would hear the application, but that by 22 November 2019, Justice for

Tenants had to provide signed confirmation from Li Qi Ming and Jiangrui Wan that they wished to be treated as applicants in this application, as well as written confirmation that all the applicants authorised Justice for Tenants to act as their representative in this application. Those requirements were complied with on 19 November 2019, and the tribunal is satisfied that the application can proceed on the basis that it is brought by all three applicants. We waive the procedural irregularity, now corrected, that occurred when the application was submitted by all three applicants, but only signed by Jianan Jiang.

8. The only representations received from the respondent were contained in an email from Mr Newton-Mensah to the tribunal, sent on 25 September 2019. In those representations he asserted that the applicants had caused damage to the Flat, but he did not address the applicants' case that the Flat needed to be licensed as a HMO for the period of their occupation, and was not so licensed.
9. As McClenahan stated that he had not seen that email before we adjourned for a short while to allow him to consider its contents. When we resumed, he confirmed that he had no objection to the tribunal considering these representations, and we agreed that we would do so.
10. At the hearing on 11 November 2019, Mr Newton Mensah's position was that his wife had instructed The Cloister to let the Flat and that neither he or his wife were aware that a HMO License was required. They considered that it was The Cloister's responsibility to advise them of this, if it were the case, but it did not do so. He acknowledged that no HMO licence had been obtained.
11. Mr McClenahan's position was that all the requirements for the making of a RRO were met. He sought a RRO in the sum of £31,882 and an order for payment by the respondent of the application and hearing fees paid by the applicants.

Decision and Reasons

12. We are not satisfied, on the criminal standard of proof that Ms Agbeka has committed an offence under s.72(1) of the 2004 Act.
13. Section 72 provides as follows:
 - (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.
14. The terms "person having control" and "person managing" are defined in s.263 of the 2004 Act.
15. We accept that *if* the Flat was an HMO, that Ms Agbeka would constitute a "person managing" the property because the definition in s.263(3) includes an owner or lessee of premises who receives (whether

directly or through an agent) rent from persons who are in occupation as tenants of parts of the HMO. That she received rent from the applicants, via The Cloister, does not appear to be disputed.

16. Arguably, she might also be a person having control of an HMO. The definition in s.263 includes the person who receives the rack-rent of the premises, “rack-rent” being defined as a rent which is not less than two-thirds of the full net annual value of the premises. However, we cannot be certain that this is the case as there is no evidence before us as to annual value of the Flat, nor how much rent was passed on to the respondent by The Cloisters.
17. We are also satisfied that the Flat is in an area that is subject to additional licensing for HMOs. Section 56(1) of the 2004 Act empowers a local housing authority to designate either the whole of the area of their district, or part of it, as subject to additional licensing in relation to a description of HMOs specified in the designation. On 15 June 2015, London Borough of Camden designated the whole of its borough as subject to additional HMO licensing, with effect from 8 December 2015. The designation was for a period of five years, and applied to all HMOs as defined by s.254 of the 2004 Act that are occupied by three or more persons, comprising two or more households.
18. However, on the evidence before us, we are not satisfied that the Flat was an HMO at the time it was let to the applicants.
19. An HMO is defined at section 254 of the 2004 Act as follows:
 - (1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if–
 - (a) it meets the conditions in subsection (2) (“the standard test”);
 - (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
 - (c) it meets the conditions in subsection (4) (“the converted building test”);
 - (d) an HMO declaration is in force in respect of it under section 255; or
 - (e) it is a converted block of flats to which section 257 applies.
20. There is no evidence to suggest that a HMO declaration was in force in respect of the Flat, and nowhere in the application, or their statement of case, do the applicants explain why the Flat constituted an HMO, as defined in s.254, when it was let to the applicants. Nor did Mr McClenahan address this question when he made his submissions to us.

21. *If* the Flat constituted an HMO, then this would most likely be on the basis that the conditions of the standard test were met. S.254(2) provides that a building or a part of a building meets the standard test if–

- (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
- (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
- (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
- (d) their occupation of the living accommodation constitutes the only use of that accommodation;
- (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
- (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.”

22. In this case, there is no evidence before us, to establish that the standard test was met. Specifically, there is no evidence as to whether:

- (a) this was, or was not, a self-contained flat ('self-contained flat' means a separate set of premises (whether or not on the same floor): (i) which forms part of a building; (ii) either the whole or a material part of which lies above or below some other part of the building; and (iii) in which all three basic amenities are available for the exclusive use of its occupants – see s. 254(8) of the 2004 Act;
- (b) the living accommodation was occupied by persons who did not form a single household. Persons are to be regarded as not forming a single household for the purposes of section 254 unless: (i) they are all members of the same family; or (ii) where their circumstances are of a type specified for in regulations (see s.258 of the 2004 Act). S258(3) specifies that for the purposes of subsection (2)(a) a person is a member of the same family as another person if: (i) those persons are married to each other or live together as husband and wife (or in an equivalent relationship in the case of persons of the same sex);(ii) one of them is a relative of the other; or (iii) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple. In this application, there is no evidence as to all as to the

relationship, or lack of relationship, between the applicants;
and

(c) the living accommodation was occupied by those persons as their only or main residence or that they should be treated as so occupying it. S.259(2) of the 2004 Act provides that a person is to be treated as occupying a building, or part of it, as their only or main residence, if it is the person's residence for the purpose of undertaking a full-time course of further or higher education. However, no evidence has been provided by the applicants as to whether their courses were full-time or part time, and whether they constituted higher education courses.

23. With some regret, we conclude that the applicants have failed to satisfy the evidential burden on them, to establish, beyond reasonable doubt, that the Flat was an HMO, and that an offence under s.72(1) has been committed. The application is therefore dismissed, and the application for reimbursement of tribunal fees refused.

24. We appreciate that the applicants may consider this to be a harsh decision. However, the evidential burden is on them to satisfy us that an offence has been committed, and this is to the criminal standard of proof. This evidential burden was made clear to the applicants in the tribunal's directions of 28 June 2019, which provided that the bundle of documents to be submitted by them in support of their application must include:

“Full details of the alleged offence, with supporting documents from the local housing authority, if available (**Note:** the tribunal will need to be satisfied **beyond reasonable doubt** that an offence has been committed)”

25. The directions also made provision for the applicants' bundle to include:

“The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/ summary of their evidence, stating that it is true...”

26. The applicants have not, however, addressed the question of whether the Flat was an HMO for the purposes of the alleged offence, and have provided no witness evidence that would assist us in determining that an offence has been committed. Their application must be dismissed.

Name: Amran Vance

Date: 23 December 2019

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

- (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.
- (2) - (10)

254 Meaning of “house in multiple occupation”

- (1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if—
 - (a) it meets the conditions in subsection (2) (“the standard test”);
 - (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
 - (c) it meets the conditions in subsection (4) (“the converted building test”);
 - (d) an HMO declaration is in force in respect of it under section 255; or
 - (e) it is a converted block of flats to which section 257 applies.
- (2) A building or a part of a building meets the standard test if—
 - (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
 - (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
 - (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
 - (d) their occupation of the living accommodation constitutes the only use of that accommodation;
 - (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
 - (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

258 HMOs: persons not forming a single household

- (1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

- (2) Persons are to be regarded as not forming a single household unless—
 - (a) they are all members of the same family, or
 - (b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.
- (3) For the purposes of subsection (2)(a) a person is a member of the same family as another person if—
 - (a) those persons are married to each other or live together as husband and wife (or in an equivalent relationship in the case of persons of the same sex);
 - (b) one of them is a relative of the other; or
 - (c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.
- (4) For those purposes—
 - (a) a “couple” means two persons who are married to each other or otherwise fall within subsection (3)(a);
 - (b) “relative” means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;
 - (c) a relationship of the half-blood shall be treated as a relationship of the whole blood; and
 - (d) the stepchild of a person shall be treated as his child.
- (5) Regulations under subsection (2)(b) may, in particular, secure that a group of persons are to be regarded as forming a single household only where (as the regulations may require) each member of the group has a prescribed relationship, or at least one of a number of prescribed relationships, to any one or more of the others.
- (6) In subsection (5) “prescribed relationship” means any relationship of a description specified in the regulations.

259 HMOs: persons treated as occupying premises as only or main residence

- (1) This section sets out when persons are to be treated for the purposes of section 254 as occupying a building or part of a building as their only or main residence.
- (2) A person is to be treated as so occupying a building or part of a building if it is occupied by the person—
 - (a) as the person's residence for the purpose of undertaking a full-time course of further or higher education;
 - (b) as a refuge, or

- (c) in any other circumstances which are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.

(3)

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
- (a) repay an amount of rent paid by a tenant, or
- (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.
- (3) A reference to “*an offence to which this Chapter applies*” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	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

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

Section 41 Application for rent repayment order

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if —
 - (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - (b) the offence was committed in the period of 12 months ending with the day on which the application is made.
- (3) A local housing authority may apply for a rent repayment order only if—
 - (a) the offence relates to housing in the authority's area, and
 - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined in accordance with—
 - (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in the table.

***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.