FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/HMFK/2019/0070**
Property	**:**	**24 Eastfield Road, London, E17 3BA**
Applicants	**:**	**1. Niamh McCafferty,** **2. Kirsty Hobson,** **3. Charlotte Perry Pike**
Representative	**:**	**Ben Reeve (Safer Renting)**
Respondent	**:**	**Lahrie Mohamed**
Interested Party	**:**	**Rosewall Properties Limited**
Representative	**:**	**Sam Madge-Wyld (Counsel)**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge Robert Latham** **Susan Coughlin MCIEH**
Date and Venue of Hearing	**:**	**22 January 2020 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**20 March 2020**

DECISION

Decisions of the Tribunal

(i) The Tribunal joins Rosewall Properties Limited as an interested party.

(ii) The Tribunal is satisfied that it has no jurisdiction to add or substitute Rosewall Properties Limited as a respondent as the 12 month limitation period for doing so had expired by the date when the procedural application was made.

(iii) The Tribunal dismisses the application for a Rent Repayment Order against the Respondent as it was not a "landlord".

The Application

1. On 26 September 2019, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") in respect of 24 Eastfield Road, London, E17 3BA ("the property"). On 9 October 2019, the Tribunal gave Directions which provided for the application to be determined on 22 January**.**

2. On 22 January, the applicants were represented by Mr Ben Reeve from Safer Renting, a charity which offers housing advice. The respondent was represented by Mr Sam Madge-Wyld, Counsel, instructed by Morrisons Solicitors. Mr Madge-Wyld raised a preliminary issue that the application had been issued against the wrong respondent. The landlord was Rosewall; whilst the application has been issued against Mr Mohamed. It is trite law that a company is a separate legal entity from its directors. Any application should therefore have been issued against Rosewall. It is now too late to issue such an application as the 12-month limitation period has now expired. He therefore argued that the application was bound to fail as it had not been issued against "a landlord".

3. Two issues arose:

   (i) Was it arguable that the application was issued against Rosewall, whilst Mr Mohamed was merely identified as a director of the company?

   (ii) If the application was issued against Mr Mohamed, did the Tribunal have jurisdiction to add or substitute Rosewall for Mr Mohamed pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") given that the 12-month limitation period had now expired? If so, should such an addition or substitution be made?

4. Having heard submissions from the parties, the Tribunal was satisfied that the application has been issued against Mr Mohamed:

(i) The application form named the respondent as "Lahrie Mohamed". His address was given as "Rosewall Properties Limited, 113 Hoe Street, London, E17 4RX".

(ii) In its extended reasons filed pursuant to the Directions, the applicants state that a RRO is sought on the grounds that "Lahrie Mohamed of Rosewall Properties Ltd" has committed the relevant offence.

(iii) In his response filed pursuant to the Directions, Mr Mohamed asserts that a RRO can only be made against "a landlord" and that he was not such a landlord.

(iv) On 19 December, the applicants filed a Reply in which they repeat that the respondent is a director of Rosewall. It is suggested that Mr Mohamed is thereby "a person having control of or managing the property".

5. The Tribunal recognised that the issue as to whether the tribunal has jurisdiction to substitute Rosewall for Mr Mohamed raised an important issue of law. Rosewall was not represented at the hearing and had the right to be heard on the issue. Mr Madge-Wyld stood by his position that in the absence of any substitution, the application was bound to fail. The parties agreed that the tribunal should determine the following issues on the papers, in the light of any further written submissions made by the parties:

(i) Whether the Tribunal (a) has jurisdiction to add or substitute Rosewall as a respondent; and (b) If so, whether it should do so.

(ii) If no such addition or substitution is made, whether the application is bound to fail on the ground that Mr Mohamed is not "a landlord" for the purposes of the 2016 Act.

6. The Tribunal gave further Directions as a result of which:

(i) Rosewall have applied to be joined as an interested party. The Tribunal grants this application.

(ii) Mr Madge-Wyld has filed written submission on behalf of Rosewall. He has referred us to the Upper Tribunal ("UT") decision of *William Hill Organisation Limited v Crossrail Limited* [2016] UKUT 275 (LC) ("*William Hill*"). The Deputy President, Martin Rodger QC, was required to determine whether Transport for London ("TfL") should be substituted for Crossrail Limited ("Crossrail") in an application for a disturbance payment under section 37(1)(a) of the Land Compensation Act 1973. In its application, the applicant had, by mistake, wrongly identified Crossrail, rather than TfL as the acquiring authority. It now applied, after the expiry of the limitation period, to substitute TfL for Crossrail.

(iii) Mr Reeve has filed written submissions on behalf of the applicants

7. The relevant legal provisions are set out in the Appendix to this decision.

The Factual Background

8. The following facts are relevant to this application:

(i) On 13 September 2017, the Land Registry registered Rosewall Properties Limited ("Rosewall") as the freehold owner of the property.

(ii) Mr Lahrie Mohamed is a director of Rosewall.

(iii) On 21 April 2018, Rosewall granted these three applicants an assured shorthold tenancy of the property at a rent of £2,750 for a term of 12 months.

(iv) The applicants contend that the property was an HMO which was required to be registered and was not so registered. An offence was therefore committed under section 72(1) of the Housing Act 2004.

(v) On 1 November 2018, the London Borough of Waltham Forest served an interim management order and changed the locks. Upon the making of the order, the offence ceased.

(vi) On 26 September 2019, the applicants issued their application to this tribunal seeking RROs against Mr Mohamed pursuant to section 41 of the 2016 Act. The alleged offence had been committed in the period of 12 months ending with the date on which the application is made to the tribunal.

(vii) The applicants issued their application with the assistance of Safer Renting. A mistake was made in specifying Mr Mohamed, a director of Rosewall, as respondent, rather than the company itself. The mistake arose from failing to recognise that Rosewall is a separate legal entity from its directors. The error was very similar to that in *William Hill* where the applicant had failed to recognise that Crossrail and TfL were separate legal entities.

(viii) At the hearing on 22 January 2020, the applicants applied to add or substitute Rosewall as a respondent. This was more than 12 months after the offence had ceased to be committed.

(ix) A Tribunal may only make a RRO if satisfied, beyond reasonable doubt, that "a landlord" has committed under section 72(1).

Issue 1: Does the Tribunal have Jurisdiction to add or substitute Rosewall as a respondent after the expiry of the limitation period?

The Statutory Provisions

9. Section 41 of 2016 Act provides:

> "(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."

10. The 2016 Act imposes a strict limitation period of 12 months for any application for a RRO. A local housing authority ("LHA") may also bring an application for a RRO. A LHA must first serve a Notice of intended proceedings, which may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates. The 2016 Act makes no provision for extending the 12 month time limit.

The Tribunal's Procedural Rules

11. The Tribunal was established by Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The Tribunal Rules, made pursuant to Schedule 5, regulate procedure before the Tribunal. By rule 3(1) the overriding objective of the rules is to enable the Tribunal to deal with cases fairly and justly. The Tribunal is required by rule 3(3)(b) to give effect to that objective when it interprets any rule or practice direction. Dealing with a case fairly and justly includes "avoiding unnecessary formality and seeking flexibility in the proceedings" (rule 3(2)(b)).

12. The Tribunal Rules give the Tribunal wide case management powers, the most significant of which is the most general, namely rule 6(1) which provides that: "Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure."

13. By rule 10(1), the Tribunal is given specific powers in relation to the addition, substitution and removal of parties. These are expressed simply, as required by section 22(4) of the 2007 Act. Rule 10 makes provision for the "addition, substitution and removal of parties":

> "(1) The Tribunal may give a direction adding, substituting or removing a person as an applicant or a respondent.
>
> (2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.
>
> (3) A person who is not a party may apply to the Tribunal to be added or substituted as a party."

Determination of Issue 1

14. Does the Tribunal have jurisdiction to add or substitute Rosewall for Mr Mohamed after the expiry of the twelve month limitation period? In *William Hill*, the Deputy President answered the question in the negative. The UT was required to determine whether TfL should be substituted for Crossrail in an application for a disturbance payment under section 37(1)(a) of the Land Compensation Act 1973. The limitation period was applied by section 9(1) of the Limitation Act 1980 which provides that any "action to recover any sum recoverable by virtue of any enactment" must be brought within 6 years of the date on which "the cause of action accrued".

15. Procedure in the UT is regulated by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. However, these are similar in all relevant regards to the Tribunal Rules, namely (i) the overriding objectives (rule 2); (ii) the case management powers (rule 5); and (iii) the power to add, substitute or remove a party (rule 9). The Deputy President sets out his reasons for concluding that the Tribunal has no power under the rules to substitute a party after the expiry of the limitation period are set out at [47] to [51].

16. The UT's reasoning is of equal application to the facts of this case. The Tribunal has no power to extend an applicable statutory limitation period. This has been confirmed in *Harringay Meat Traders Ltd v Greater London Authority* [2014] UKUT 0302 (LC). In certain circumstances, including under the Limitation Act, limitation periods are matters of procedure rather than substance and, in an appropriate case, can be waived or become the subject of an estoppel (see *Hillingdon London Borough Council v ARC Limited* (No.2) [2000] EWCA Civ 191). In the current case, the time limit is jurisdictional. The Tribunal has no jurisdiction to make a RRO unless the application is made within the relevant twelve month period.

17. Secondly, the Tribunal exists "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act" (section 3(2) of the 2007 Act) and its jurisdiction is limited by statute. The Tribunal's general power to regulate its own procedure is expressly made "subject to the provisions of the 2007 Act and any other enactment" (rule 6(1) of the Tribunal Rules. Among those provisions is section 41(2)(b) of

the 2016 Act which only affords the Tribunal jurisdiction to make a RRO if "the offence was committed in the period of 12 months ending with the day on which the application is made."

18. This led to the deputy President's conclusion at [51]:

> "I therefore agree with the submission of Mr Glover and find it impossible to accept that rule 9(1) confers jurisdiction to permit a new claim to be made after the expiry of a limitation period, since that would be expressly contrary to section 9(1) of the 1980 Act."

19. In *William Hill*, the Deputy President found in favour of the applicant on an alternative argument based on Section 35(3) to (6) of the 1980 Act and Rule 19.5(3) of the Civil Procedure Rules which is made in reliance of it. Mr Reeve refers us to the decision of *Insight Group Ltd v Kingston Smith (a firm) [2012] EWHC 3644 (QB); [2014] 1 WLR 1448* and seeks to rely on these provisions.

20. We are satisfied that this argument cannot avail these applicants as the limitation period is not a procedural one applied by the 1980 Act. CPR 19.5(3), made pursuant to the 1980 Act, can have no relevance to the current case. The 2016 Act affords this Tribunal no discretion. The Tribunal has no jurisdiction to determine an application for a RRO unless "the offence was committed in the period of 12 months ending with the day on which the application is made."

21. Mr Reeve also refers us to Rule 6(3)(a) of the Tribunal Rules which permits the Tribunal to "extend or shorten the time for complying with any rule, practice direction or direction, even if the application for an extension is not made until after the time limit has expired". This does not apply as the time limit is specified by statute rather than by "any rule, practice direction or direction".

Issue 2: Is the application against Mr Mohamed bound to fail as he is not "a landlord"?

22. Section 43(1) of the 2016 Act provides:

> "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 had been convicted)".

23. In *Goldsborough v CA Property Management Ltd* [2019] UKUT 311 (LC), Judge Elizabeth Cooke noted that the 2016 Act uses the phrase "a landlord", whereas section 73(5)(b) of the Housing Act 2004 had used the phrase "the appropriate person". She accepted (at [29]) that there can be no possible basis for importing into the 2016 Act the definition of the

"appropriate person" from the provisions of the 2004 Act. However, she also suggested that the phrase "a landlord" implied that there could be more than one.

24. Mr Madge-Wyld notes that the 2016 Act does not define the term "landlord". In *Street v Mountford* [1985] AC 818, Lord Templeman gave the classic formulation of the relationship of landlord and tenant in respect of residential accommodation as arising when a landlord grants a tenant exclusive possession of premises for a term at a rent (at 818C).

25. There can by no doubt in the current case that the relevant landlord was Rosewall Properties. It is the freehold owner of the property. It is the party who is named as landlord in the tenancy agreement. In their Extended Reasons (at A34), the applicants recognise that Mr Mohamed is no more than a director of Rosewall Properties. We have had regard to the detailed written submissions made by Mr Reeve. However, we are satisfied that this application must be dismissed as it has not been issued against a relevant landlord.

Conclusions

26. The Tribunal is satisfied that it has no jurisdiction to add Rosewall as a respondent to the application. We are further satisfied that the application against Mr Mohamed is bound to fail as he is not the relevant "landlord".

27. Mr Madge-Wyld indicated that the respondent is minded to make an application for costs under Rule 13(1)(b) of the Tribunal Rules. If the respondent is minded to pursue this application, we will issue Directions for the determination of the application. However, the respondent should have regard to the high threshold set by the UT in establishing "unreasonable conduct" in *Willow Court Management Company v Alexander* [2106] UKUT 290 (LC). Our preliminary view is that the applicants have acted on the advice of a Not for Profit Advice Centre who made a mistake as to the correct identity of the landlord. The mere fact that the applicants decided to continue with their application despite the error being pointed out, is unlikely to meet the high threshold set by the UT (see [24]). But for the mistake as to the identity of the respondent, it is possible that a substantial RRO would have been made.

Judge Robert Latham
20 March 2020

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.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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 to 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

	Act	*section*	*general description of offence*
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).

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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a 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 had 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 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).

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 this 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 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,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.