



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

Case Reference : BIR/00FY/HMK/2020/0003/0004/0005/0007

Property : 69 Gawthorne Street, Nottingham NG7 7JS

Applicants : (1) Tomasz Nawalny (0003)
(2) Sebastian Mikolajczyk (0004)
(3) Renata Jaworska (0005)
(4) Slawomir Konkol (0007)

Respondent : Marek Wojtczak

Representative : Assisted by Lawswood International Ltd

Type of Application : Application by tenants for Rent Repayment Orders under sections 41,41,43 and 44 of the Housing and Planning Act 2016

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

Date of Decision : 14 July 2020

DECISION

Decision

The Tribunal makes Rent Repayment Orders against the Respondent in the amounts set out below, to be paid to the respective Applicant within 28 days of the date of this Decision -

Applicant 1	£4,633.58
Applicant 2	£3,885.64
Applicant 3	£3,250.00
Applicant 4	£2,135.00

Reasons for Decision

Introduction

1. On 28th February 2020, Applicants 1,2 and 3 applied for a Rent Repayment Order stating that the Respondent had failed to 1) comply with an Improvement Notice and 2) license the Property as a House in Multiple Occupation (HMO). On 9th March 2020, Applicant 4 made an application in the same terms. Applicants 1,2,3 and 4 sought Rent Repayment Orders in the amounts of £4420; £4420; £4420 and £1870 respectively. As the applications dealt with the same issue, the cases were consolidated with no objection by the parties.

Background

2. Applicant 1 had entered a house share licence agreement on 23rd October 2015 with the Respondent for a period of 5 months for a payment of £75 per week.
3. Applicants 1 and 3 jointly rented the Property from 29th April 2017 on an Assured Shorthold Tenancy at £160 per week, excluding Council tax and utilities for which the tenants were responsible.
4. Applicant 2 rented the Property from 1st December 2018 on an Assured Shorthold Tenancy at £85 per week, excluding Council tax and utilities for which the tenant was responsible.
5. Applicant 4 rented the Property from 8th December 2018 on an Assured Shorthold Tenancy at £85 per week, excluding Council tax and utilities for which the tenant was responsible.
6. In the application forms all Applicants refer to having rented a double bedroom at the Property.
7. Under the provisions of section 12 Housing Act 2004 (“the 2004 Act”), Nottingham City Council served the Respondent with an Improvement Notice dated 18th April 2019. The Notice required remedial action regarding five Category 2 hazards and had an operative date of 23rd May 2019. Remedial action was required to be commenced on 30th May 2019 with four hazards to be remedied within four weeks and one hazard within 6 weeks of the 23rd May 2019.

8. On 4th October 2019 Nottingham City Council accepted the Respondent's application for an HMO Licence for the Property.

Inspection

9. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundle we did not consider it necessary to inspect the Property. The Applicants describe the Property as a semi-detached house comprising five bedrooms, a living room, kitchen and two bathrooms.

Hearing

10. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. Having reviewed the parties' submissions, we sought clarification by Further Directions dated 5th June 2020. The Applicants complied with the Further Directions. The Respondent failed to comply with the Further Directions and did not provide any further information. Having received the further information we are satisfied that the matter is suitable to be determined without a hearing. Although the parties are not legally represented, (though we note that the Respondent is assisted by a firm which provides legal support), the issues to be decided have been clearly identified in their respective Statements of case and additional documentation, which set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

The Law

11. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.
12. The 2016 Act applies to an offence committed under section 72(1) of the Housing Act 2004, namely the control or management of an unlicensed HMO. It also applies to an offence committed under section 30(1) of the 2004 Act, namely failure to comply with an Improvement Notice.
13. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).
14. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to offences under sections 72(1) and 30(1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
15. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of the following factors:

- a. the conduct of the landlord and the tenant
- b. the financial circumstances of the landlord and
- c. whether the landlord has at any time been convicted of an offence to which that Chapter of the Act applies.

Submissions

16. A written joint submission was made by the Applicants which was accompanied by documentary evidence of tenancy agreements; rents paid by each of the Applicants; Summons for non-payment of Council tax for years 2017/8 and 2018/9 for Applicant 1 and for year 2017/8 for Applicant 3 and letters to the four Applicants from the Council enclosing copies of the Improvement Notice dated 18th April 2019. In compliance with the Further Directions, the Applicants provided a copy of the Improvement Notice and details of bank statements showing rent payments to the Respondent.
17. The Respondent provided a written submission. He states that he knew that he needed to have an HMO Licence and had started to adapt the Property in order to get the Licence. He states he was led to believe by the Council that all procedures to obtain the Licence were being carried out without any concerns, as he was assured by the Council via email. He states that he was not informed by the authority that he needed to withdraw the existing tenancies. He states that he was advised by the Council that he was following the Council's suggestions well. He states that he was in regular contact with the Council at the pertinent time, including enquiring as to the date the HMO Licence application would be determined. The Respondent states that all tenants occupying the Property at the time were regularly updated on the progress of obtaining the HMO Licence and were 'happy and content' to continue with their tenancies having been told by the Respondent of the issues concerned. The Respondent did not provide any documentary evidence of email correspondence with the Council which would support his assertions.
18. The Respondent advised that income from the Property was £19,890 with costs of £18,486 and stated 'Clearing period for one year'. There was no breakdown of the costs figure. The Respondent included an extract from bank statements between 19th November 2019 and 19th January 2020 which includes details of payments of £85 each referenced as 'House rent' from Applicants 1 and 2 and payments of £170.00 for "rent" from Applicant 3. The extract also has marked payments from at least seven other people, referenced with other addresses, but the names are not those of Applicant 4. The Respondent has marked an item dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748 but with no explanation of to what this figure relates.

Deliberations

19. We considered the applications in four stages –
 - a) Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) and/ or section 30(1) of the 2004 Act.

- b) Whether the Applicants were entitled to apply to the Tribunal for a Rent Repayment Order;
- c) Whether we should exercise our discretion to make a Rent Repayment Order;
- d) Determination of the amount of any Order

Offences

Section 72 (1) of the 2004 Act

- 20. Section 72(1) provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under section 61(1) of the 2004 Act but is not so licensed.
- 21. The Respondent has never suggested that the Property was not an HMO. The evidence of the Applicants in their applications and of the tenancy agreements suggests that the Property meets the conditions of the standard test as set out in section 254(2) of the 2004 Act and we determine that the Property was an HMO.
- 22. A Licence for the Property as an HMO was required under section 61(1) of the 2004 Act. There was no Licence or a duly made application for a Licence until 4th October 2019. Applicants 1,2,3 and 4 had been tenants of the Property from 22nd October 2014; 1st December 2018; 21st December 2014 and 16th December 2018 respectively and, (with the exception of Applicant 4 who left in in June 2019), until (and beyond) the 4th October 2019. We noted the rent payments by all Applicants were made directly to the Respondent through bank transfers.
- 23. On the basis of the facts set out in para 22 above, we are satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72 (1) of the 2004 Act, namely being a person having control or managing an HMO which was required to be licensed under section 61(1) of the 2004 Act but was not so licensed. An application for an HMO Licence was not duly made until 4th October 2019 when the commission of the offence ceased.

Section 30 (1) of the 2004 Act

- 24. Section 30(1) provides that where an Improvement Notice has become operative, the person on whom it was served commits an offence if he fails to comply with it.
- 25. Whilst an Improvement Notice was served on the Respondent on 18th April 2019 and was operative from 23rd May 2019, we have no evidence that the Respondent failed to comply with the Notice either by failing to start remedial action by the required date within the Notice or by failing to complete the remedial action by the required date(s).
- 26. We are not satisfied, beyond a reasonable doubt, that the Respondent has committed an offence under section 30(1) of the 2004 Act.

Entitlement of the Applicants to apply for a Rent Repayment Order

27. We determine that all Applicants were entitled to apply for Rent Repayment Orders. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicants and the offence was committed in the period of 12 months ending with the day on which the applications to the Tribunal were made (28th February 2020 and 9th March 2020). The Applicants have demonstrated by their bank statements that they had paid rent.

Discretion to make a Rent Repayment Order

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

Amount of Rent Repayment Order

29. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 72(1) of the 2004 Act. The Respondent ceased to commit the offence on 4th October 2019 when the application for the HMO licence was duly made. The relevant period during which the offence was committed was therefore 4th October 2018 to 3rd October 2019 inclusive.
30. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. During the relevant period the Applicants paid the sums set out below, (pro rated for Applicants 1 and 2 to take account of fact that their last weekly rent payments included rent for several days beyond 3rd October 2019 which is when the offence ceased):

Applicant 1 **£4633.58**

Applicant 2 **£3885.64**

Applicant 3 **£3250** from 15.1.19 to 4.10.19.

The Applicant has not provided any bank records regarding the period July 2018- 14 Jan 2019. It is stated on her behalf that a friend who was living with her was paying the rent but we have not been provided with such evidence. We have therefore only taken account of the rent for which there is evidence of payment by the Applicant.

Applicant 4 **£2135** from 8.12.18 to 1.6.19

31. We had regard to the case of *Vadamalayan v Stewart and others* (2020 UKUT 0183) which concerned the calculation of a Rent Repayment Order under section 44 of the 2016 Act. The Upper Tribunal held that:

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

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

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

Conduct

32. We considered the Respondent's submission that he knew he needed to have a Licence and had already started adapting the Property to acquire a Licence. As an Improvement Notice under section 12 of the Housing Act 2004 had been served, it is clear that disrepair matters were present at the Property at the time of the Applicants' occupancy. We considered that the Respondent had some confusion regarding the purpose of the Improvement Notice (which can apply to any residential dwelling whether or not an HMO) as distinct from the quite separate need to apply for a Licence for an HMO.
33. We noted the Respondent's assertion that all the Applicants were content and happy to continue with the tenancies having been told by the Respondent of the issues concerned.
34. We do not find anything in the conduct of the Applicants or the Respondent that needs to be taken into account.

Financial

35. Despite seeking details by Further Directions, we were not provided with any details of the Respondent's personal financial circumstances nor any information he wished us to take into account regarding such circumstances. We noted the Respondent's statement regarding the total income of and costs for the Property but with no detail provided as to the detail or breakdown of the costs. We noted the rent he received as income from the Property. There is no explanation of the figure in the bank extract dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748. We had limited evidence on which to assess the Respondent's personal financial circumstances, but are aware from the extract of bank statements between 19th November 2019 and 19th January 2020, that rental payments appear to be received from people other than the Applicants.

Conviction

36. We had no evidence that the Respondent had been convicted of any housing related offences or received any financial penalties.

37. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.
38. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicants in the above amounts within 28 days of the date of this decision, or fail to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicants, then they can recover the amounts in the County Court.

Costs

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

Appeal

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

.....

Judge T N Jackson



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9. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundle we did not consider it necessary to inspect the Property. The Applicants describe the Property as a semi-detached house comprising five bedrooms, a living room, kitchen and two bathrooms.

Hearing

10. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. Having reviewed the parties' submissions, we sought clarification by Further Directions dated 5th June 2020. The Applicants complied with the Further Directions. The Respondent failed to comply with the Further Directions and did not provide any further information. Having received the further information we are satisfied that the matter is suitable to be determined without a hearing. Although the parties are not legally represented, (though we note that the Respondent is assisted by a firm which provides legal support), the issues to be decided have been clearly identified in their respective Statements of case and additional documentation, which set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

The Law

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13. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).
14. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to offences under sections 72(1) and 30(1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
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- a. the conduct of the landlord and the tenant
- b. the financial circumstances of the landlord and
- c. whether the landlord has at any time been convicted of an offence to which that Chapter of the Act applies.

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17. The Respondent provided a written submission. He states that he knew that he needed to have an HMO Licence and had started to adapt the Property in order to get the Licence. He states he was led to believe by the Council that all procedures to obtain the Licence were being carried out without any concerns, as he was assured by the Council via email. He states that he was not informed by the authority that he needed to withdraw the existing tenancies. He states that he was advised by the Council that he was following the Council's suggestions well. He states that he was in regular contact with the Council at the pertinent time, including enquiring as to the date the HMO Licence application would be determined. The Respondent states that all tenants occupying the Property at the time were regularly updated on the progress of obtaining the HMO Licence and were 'happy and content' to continue with their tenancies having been told by the Respondent of the issues concerned. The Respondent did not provide any documentary evidence of email correspondence with the Council which would support his assertions.
18. The Respondent advised that income from the Property was £19,890 with costs of £18,486 and stated 'Clearing period for one year'. There was no breakdown of the costs figure. The Respondent included an extract from bank statements between 19th November 2019 and 19th January 2020 which includes details of payments of £85 each referenced as 'House rent' from Applicants 1 and 2 and payments of £170.00 for "rent" from Applicant 3. The extract also has marked payments from at least seven other people, referenced with other addresses, but the names are not those of Applicant 4. The Respondent has marked an item dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748 but with no explanation of to what this figure relates.

Deliberations

19. We considered the applications in four stages –
 - a) Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) and/ or section 30(1) of the 2004 Act.

- b) Whether the Applicants were entitled to apply to the Tribunal for a Rent Repayment Order;
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Offences

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- 20. Section 72(1) provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under section 61(1) of the 2004 Act but is not so licensed.
- 21. The Respondent has never suggested that the Property was not an HMO. The evidence of the Applicants in their applications and of the tenancy agreements suggests that the Property meets the conditions of the standard test as set out in section 254(2) of the 2004 Act and we determine that the Property was an HMO.
- 22. A Licence for the Property as an HMO was required under section 61(1) of the 2004 Act. There was no Licence or a duly made application for a Licence until 4th October 2019. Applicants 1,2,3 and 4 had been tenants of the Property from 22nd October 2014; 1st December 2018; 21st December 2014 and 16th December 2018 respectively and, (with the exception of Applicant 4 who left in in June 2019), until (and beyond) the 4th October 2019. We noted the rent payments by all Applicants were made directly to the Respondent through bank transfers.
- 23. On the basis of the facts set out in para 22 above, we are satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72 (1) of the 2004 Act, namely being a person having control or managing an HMO which was required to be licensed under section 61(1) of the 2004 Act but was not so licensed. An application for an HMO Licence was not duly made until 4th October 2019 when the commission of the offence ceased.

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- 24. Section 30(1) provides that where an Improvement Notice has become operative, the person on whom it was served commits an offence if he fails to comply with it.
- 25. Whilst an Improvement Notice was served on the Respondent on 18th April 2019 and was operative from 23rd May 2019, we have no evidence that the Respondent failed to comply with the Notice either by failing to start remedial action by the required date within the Notice or by failing to complete the remedial action by the required date(s).
- 26. We are not satisfied, beyond a reasonable doubt, that the Respondent has committed an offence under section 30(1) of the 2004 Act.

Entitlement of the Applicants to apply for a Rent Repayment Order

27. We determine that all Applicants were entitled to apply for Rent Repayment Orders. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicants and the offence was committed in the period of 12 months ending with the day on which the applications to the Tribunal were made (28th February 2020 and 9th March 2020). The Applicants have demonstrated by their bank statements that they had paid rent.

Discretion to make a Rent Repayment Order

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

Amount of Rent Repayment Order

29. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 72(1) of the 2004 Act. The Respondent ceased to commit the offence on 4th October 2019 when the application for the HMO licence was duly made. The relevant period during which the offence was committed was therefore 4th October 2018 to 3rd October 2019 inclusive.
30. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. During the relevant period the Applicants paid the sums set out below, (pro rated for Applicants 1 and 2 to take account of fact that their last weekly rent payments included rent for several days beyond 3rd October 2019 which is when the offence ceased):

Applicant 1 **£4633.58**

Applicant 2 **£3885.64**

Applicant 3 **£3250** from 15.1.19 to 4.10.19.

The Applicant has not provided any bank records regarding the period July 2018- 14 Jan 2019. It is stated on her behalf that a friend who was living with her was paying the rent but we have not been provided with such evidence. We have therefore only taken account of the rent for which there is evidence of payment by the Applicant.

Applicant 4 **£2135** from 8.12.18 to 1.6.19

31. We had regard to the case of *Vadamalayan v Stewart and others* (2020 UKUT 0183) which concerned the calculation of a Rent Repayment Order under section 44 of the 2016 Act. The Upper Tribunal held that:

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

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Conduct

32. We considered the Respondent's submission that he knew he needed to have a Licence and had already started adapting the Property to acquire a Licence. As an Improvement Notice under section 12 of the Housing Act 2004 had been served, it is clear that disrepair matters were present at the Property at the time of the Applicants' occupancy. We considered that the Respondent had some confusion regarding the purpose of the Improvement Notice (which can apply to any residential dwelling whether or not an HMO) as distinct from the quite separate need to apply for a Licence for an HMO.
33. We noted the Respondent's assertion that all the Applicants were content and happy to continue with the tenancies having been told by the Respondent of the issues concerned.
34. We do not find anything in the conduct of the Applicants or the Respondent that needs to be taken into account.

Financial

35. Despite seeking details by Further Directions, we were not provided with any details of the Respondent's personal financial circumstances nor any information he wished us to take into account regarding such circumstances. We noted the Respondent's statement regarding the total income of and costs for the Property but with no detail provided as to the detail or breakdown of the costs. We noted the rent he received as income from the Property. There is no explanation of the figure in the bank extract dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748. We had limited evidence on which to assess the Respondent's personal financial circumstances, but are aware from the extract of bank statements between 19th November 2019 and 19th January 2020, that rental payments appear to be received from people other than the Applicants.

Conviction

36. We had no evidence that the Respondent had been convicted of any housing related offences or received any financial penalties.

37. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.
38. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicants in the above amounts within 28 days of the date of this decision, or fail to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicants, then they can recover the amounts in the County Court.

Costs

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

Appeal

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

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Judge T N Jackson



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DECISION

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The Tribunal makes Rent Repayment Orders against the Respondent in the amounts set out below, to be paid to the respective Applicant within 28 days of the date of this Decision -

Applicant 1	£4,633.58
Applicant 2	£3,885.64
Applicant 3	£3,250.00
Applicant 4	£2,135.00

Reasons for Decision

Introduction

1. On 28th February 2020, Applicants 1,2 and 3 applied for a Rent Repayment Order stating that the Respondent had failed to 1) comply with an Improvement Notice and 2) license the Property as a House in Multiple Occupation (HMO). On 9th March 2020, Applicant 4 made an application in the same terms. Applicants 1,2,3 and 4 sought Rent Repayment Orders in the amounts of £4420; £4420; £4420 and £1870 respectively. As the applications dealt with the same issue, the cases were consolidated with no objection by the parties.

Background

2. Applicant 1 had entered a house share licence agreement on 23rd October 2015 with the Respondent for a period of 5 months for a payment of £75 per week.
3. Applicants 1 and 3 jointly rented the Property from 29th April 2017 on an Assured Shorthold Tenancy at £160 per week, excluding Council tax and utilities for which the tenants were responsible.
4. Applicant 2 rented the Property from 1st December 2018 on an Assured Shorthold Tenancy at £85 per week, excluding Council tax and utilities for which the tenant was responsible.
5. Applicant 4 rented the Property from 8th December 2018 on an Assured Shorthold Tenancy at £85 per week, excluding Council tax and utilities for which the tenant was responsible.
6. In the application forms all Applicants refer to having rented a double bedroom at the Property.
7. Under the provisions of section 12 Housing Act 2004 (“the 2004 Act”), Nottingham City Council served the Respondent with an Improvement Notice dated 18th April 2019. The Notice required remedial action regarding five Category 2 hazards and had an operative date of 23rd May 2019. Remedial action was required to be commenced on 30th May 2019 with four hazards to be remedied within four weeks and one hazard within 6 weeks of the 23rd May 2019.

8. On 4th October 2019 Nottingham City Council accepted the Respondent's application for an HMO Licence for the Property.

Inspection

9. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundle we did not consider it necessary to inspect the Property. The Applicants describe the Property as a semi-detached house comprising five bedrooms, a living room, kitchen and two bathrooms.

Hearing

10. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. Having reviewed the parties' submissions, we sought clarification by Further Directions dated 5th June 2020. The Applicants complied with the Further Directions. The Respondent failed to comply with the Further Directions and did not provide any further information. Having received the further information we are satisfied that the matter is suitable to be determined without a hearing. Although the parties are not legally represented, (though we note that the Respondent is assisted by a firm which provides legal support), the issues to be decided have been clearly identified in their respective Statements of case and additional documentation, which set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

The Law

11. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.
12. The 2016 Act applies to an offence committed under section 72(1) of the Housing Act 2004, namely the control or management of an unlicensed HMO. It also applies to an offence committed under section 30(1) of the 2004 Act, namely failure to comply with an Improvement Notice.
13. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).
14. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to offences under sections 72(1) and 30(1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
15. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of the following factors:

- a. the conduct of the landlord and the tenant
- b. the financial circumstances of the landlord and
- c. whether the landlord has at any time been convicted of an offence to which that Chapter of the Act applies.

Submissions

16. A written joint submission was made by the Applicants which was accompanied by documentary evidence of tenancy agreements; rents paid by each of the Applicants; Summons for non -payment of Council tax for years 2017/8 and 2018/9 for Applicant 1 and for year 2017/8 for Applicant 3 and letters to the four Applicants from the Council enclosing copies of the Improvement Notice dated 18th April 2019. In compliance with the Further Directions, the Applicants provided a copy of the Improvement Notice and details of banks statements showing rent payments to the Respondent.
17. The Respondent provided a written submission. He states that he knew that he needed to have an HMO Licence and had started to adapt the Property in order to get the Licence. He states he was led to believe by the Council that all procedures to obtain the Licence were being carried out without any concerns, as he was assured by the Council via email. He states that he was not informed by the authority that he needed to withdraw the existing tenancies. He states that he was advised by the Council that he was following the Council's suggestions well. He states that he was in regular contact with the Council at the pertinent time, including enquiring as to the date the HMO Licence application would be determined. The Respondent states that all tenants occupying the Property at the time were regularly updated on the progress of obtaining the HMO Licence and were 'happy and content' to continue with their tenancies having been told by the Respondent of the issues concerned. The Respondent did not provide any documentary evidence of email correspondence with the Council which would support his assertions.
18. The Respondent advised that income from the Property was £19,890 with costs of £18,486 and stated 'Clearing period for one year'. There was no breakdown of the costs figure. The Respondent included an extract from bank statements between 19th November 2019 and 19th January 2020 which includes details of payments of £85 each referenced as 'House rent' from Applicants 1 and 2 and payments of £170.00 for "rent" from Applicant 3. The extract also has marked payments from at least seven other people, referenced with other addresses, but the names are not those of Applicant 4. The Respondent has marked an item dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748 but with no explanation of to what this figure relates.

Deliberations

19. We considered the applications in four stages –
 - a) Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) and/ or section 30(1) of the 2004 Act.

- b) Whether the Applicants were entitled to apply to the Tribunal for a Rent Repayment Order;
- c) Whether we should exercise our discretion to make a Rent Repayment Order;
- d) Determination of the amount of any Order

Offences

Section 72 (1) of the 2004 Act

- 20. Section 72(1) provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under section 61(1) of the 2004 Act but is not so licensed.
- 21. The Respondent has never suggested that the Property was not an HMO. The evidence of the Applicants in their applications and of the tenancy agreements suggests that the Property meets the conditions of the standard test as set out in section 254(2) of the 2004 Act and we determine that the Property was an HMO.
- 22. A Licence for the Property as an HMO was required under section 61(1) of the 2004 Act. There was no Licence or a duly made application for a Licence until 4th October 2019. Applicants 1,2,3 and 4 had been tenants of the Property from 22nd October 2014; 1st December 2018; 21st December 2014 and 16th December 2018 respectively and, (with the exception of Applicant 4 who left in in June 2019), until (and beyond) the 4th October 2019. We noted the rent payments by all Applicants were made directly to the Respondent through bank transfers.
- 23. On the basis of the facts set out in para 22 above, we are satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72 (1) of the 2004 Act, namely being a person having control or managing an HMO which was required to be licensed under section 61(1) of the 2004 Act but was not so licensed. An application for an HMO Licence was not duly made until 4th October 2019 when the commission of the offence ceased.

Section 30 (1) of the 2004 Act

- 24. Section 30(1) provides that where an Improvement Notice has become operative, the person on whom it was served commits an offence if he fails to comply with it.
- 25. Whilst an Improvement Notice was served on the Respondent on 18th April 2019 and was operative from 23rd May 2019, we have no evidence that the Respondent failed to comply with the Notice either by failing to start remedial action by the required date within the Notice or by failing to complete the remedial action by the required date(s).
- 26. We are not satisfied, beyond a reasonable doubt, that the Respondent has committed an offence under section 30(1) of the 2004 Act.

Entitlement of the Applicants to apply for a Rent Repayment Order

27. We determine that all Applicants were entitled to apply for Rent Repayment Orders. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicants and the offence was committed in the period of 12 months ending with the day on which the applications to the Tribunal were made (28th February 2020 and 9th March 2020). The Applicants have demonstrated by their bank statements that they had paid rent.

Discretion to make a Rent Repayment Order

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

Amount of Rent Repayment Order

29. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 72(1) of the 2004 Act. The Respondent ceased to commit the offence on 4th October 2019 when the application for the HMO licence was duly made. The relevant period during which the offence was committed was therefore 4th October 2018 to 3rd October 2019 inclusive.
30. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. During the relevant period the Applicants paid the sums set out below, (pro rated for Applicants 1 and 2 to take account of fact that their last weekly rent payments included rent for several days beyond 3rd October 2019 which is when the offence ceased):

Applicant 1 **£4633.58**

Applicant 2 **£3885.64**

Applicant 3 **£3250** from 15.1.19 to 4.10.19.

The Applicant has not provided any bank records regarding the period July 2018- 14 Jan 2019. It is stated on her behalf that a friend who was living with her was paying the rent but we have not been provided with such evidence. We have therefore only taken account of the rent for which there is evidence of payment by the Applicant.

Applicant 4 **£2135** from 8.12.18 to 1.6.19

31. We had regard to the case of *Vadamalayan v Stewart and others* (2020 UKUT 0183) which concerned the calculation of a Rent Repayment Order under section 44 of the 2016 Act. The Upper Tribunal held that:

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

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

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

Conduct

32. We considered the Respondent's submission that he knew he needed to have a Licence and had already started adapting the Property to acquire a Licence. As an Improvement Notice under section 12 of the Housing Act 2004 had been served, it is clear that disrepair matters were present at the Property at the time of the Applicants' occupancy. We considered that the Respondent had some confusion regarding the purpose of the Improvement Notice (which can apply to any residential dwelling whether or not an HMO) as distinct from the quite separate need to apply for a Licence for an HMO.
33. We noted the Respondent's assertion that all the Applicants were content and happy to continue with the tenancies having been told by the Respondent of the issues concerned.
34. We do not find anything in the conduct of the Applicants or the Respondent that needs to be taken into account.

Financial

35. Despite seeking details by Further Directions, we were not provided with any details of the Respondent's personal financial circumstances nor any information he wished us to take into account regarding such circumstances. We noted the Respondent's statement regarding the total income of and costs for the Property but with no detail provided as to the detail or breakdown of the costs. We noted the rent he received as income from the Property. There is no explanation of the figure in the bank extract dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748. We had limited evidence on which to assess the Respondent's personal financial circumstances, but are aware from the extract of bank statements between 19th November 2019 and 19th January 2020, that rental payments appear to be received from people other than the Applicants.

Conviction

36. We had no evidence that the Respondent had been convicted of any housing related offences or received any financial penalties.

37. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.
38. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicants in the above amounts within 28 days of the date of this decision, or fail to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicants, then they can recover the amounts in the County Court.

Costs

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

Appeal

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

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Judge T N Jackson



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

Case Reference : BIR/00FY/HMK/2020/0003/0004/0005/0007

Property : 69 Gawthorne Street, Nottingham NG7 7JS

Applicants : (1) Tomasz Nawalny (0003)
(2) Sebastian Mikolajczyk (0004)
(3) Renata Jaworska (0005)
(4) Slawomir Konkol (0007)

Respondent : Marek Wojtczak

Representative : Assisted by Lawswood International Ltd

Type of Application : Application by tenants for Rent Repayment Orders under sections 41,41,43 and 44 of the Housing and Planning Act 2016

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

Date of Decision : 14 July 2020

DECISION

Decision

The Tribunal makes Rent Repayment Orders against the Respondent in the amounts set out below, to be paid to the respective Applicant within 28 days of the date of this Decision -

Applicant 1	£4,633.58
Applicant 2	£3,885.64
Applicant 3	£3,250.00
Applicant 4	£2,135.00

Reasons for Decision

Introduction

1. On 28th February 2020, Applicants 1,2 and 3 applied for a Rent Repayment Order stating that the Respondent had failed to 1) comply with an Improvement Notice and 2) license the Property as a House in Multiple Occupation (HMO). On 9th March 2020, Applicant 4 made an application in the same terms. Applicants 1,2,3 and 4 sought Rent Repayment Orders in the amounts of £4420; £4420; £4420 and £1870 respectively. As the applications dealt with the same issue, the cases were consolidated with no objection by the parties.

Background

2. Applicant 1 had entered a house share licence agreement on 23rd October 2015 with the Respondent for a period of 5 months for a payment of £75 per week.
3. Applicants 1 and 3 jointly rented the Property from 29th April 2017 on an Assured Shorthold Tenancy at £160 per week, excluding Council tax and utilities for which the tenants were responsible.
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6. In the application forms all Applicants refer to having rented a double bedroom at the Property.
7. Under the provisions of section 12 Housing Act 2004 (“the 2004 Act”), Nottingham City Council served the Respondent with an Improvement Notice dated 18th April 2019. The Notice required remedial action regarding five Category 2 hazards and had an operative date of 23rd May 2019. Remedial action was required to be commenced on 30th May 2019 with four hazards to be remedied within four weeks and one hazard within 6 weeks of the 23rd May 2019.

8. On 4th October 2019 Nottingham City Council accepted the Respondent's application for an HMO Licence for the Property.

Inspection

9. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundle we did not consider it necessary to inspect the Property. The Applicants describe the Property as a semi-detached house comprising five bedrooms, a living room, kitchen and two bathrooms.

Hearing

10. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. Having reviewed the parties' submissions, we sought clarification by Further Directions dated 5th June 2020. The Applicants complied with the Further Directions. The Respondent failed to comply with the Further Directions and did not provide any further information. Having received the further information we are satisfied that the matter is suitable to be determined without a hearing. Although the parties are not legally represented, (though we note that the Respondent is assisted by a firm which provides legal support), the issues to be decided have been clearly identified in their respective Statements of case and additional documentation, which set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

The Law

11. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.
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17. The Respondent provided a written submission. He states that he knew that he needed to have an HMO Licence and had started to adapt the Property in order to get the Licence. He states he was led to believe by the Council that all procedures to obtain the Licence were being carried out without any concerns, as he was assured by the Council via email. He states that he was not informed by the authority that he needed to withdraw the existing tenancies. He states that he was advised by the Council that he was following the Council's suggestions well. He states that he was in regular contact with the Council at the pertinent time, including enquiring as to the date the HMO Licence application would be determined. The Respondent states that all tenants occupying the Property at the time were regularly updated on the progress of obtaining the HMO Licence and were 'happy and content' to continue with their tenancies having been told by the Respondent of the issues concerned. The Respondent did not provide any documentary evidence of email correspondence with the Council which would support his assertions.
18. The Respondent advised that income from the Property was £19,890 with costs of £18,486 and stated 'Clearing period for one year'. There was no breakdown of the costs figure. The Respondent included an extract from bank statements between 19th November 2019 and 19th January 2020 which includes details of payments of £85 each referenced as 'House rent' from Applicants 1 and 2 and payments of £170.00 for "rent" from Applicant 3. The extract also has marked payments from at least seven other people, referenced with other addresses, but the names are not those of Applicant 4. The Respondent has marked an item dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748 but with no explanation of to what this figure relates.

Deliberations

19. We considered the applications in four stages –
 - a) Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) and/ or section 30(1) of the 2004 Act.

- b) Whether the Applicants were entitled to apply to the Tribunal for a Rent Repayment Order;
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- 20. Section 72(1) provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under section 61(1) of the 2004 Act but is not so licensed.
- 21. The Respondent has never suggested that the Property was not an HMO. The evidence of the Applicants in their applications and of the tenancy agreements suggests that the Property meets the conditions of the standard test as set out in section 254(2) of the 2004 Act and we determine that the Property was an HMO.
- 22. A Licence for the Property as an HMO was required under section 61(1) of the 2004 Act. There was no Licence or a duly made application for a Licence until 4th October 2019. Applicants 1,2,3 and 4 had been tenants of the Property from 22nd October 2014; 1st December 2018; 21st December 2014 and 16th December 2018 respectively and, (with the exception of Applicant 4 who left in in June 2019), until (and beyond) the 4th October 2019. We noted the rent payments by all Applicants were made directly to the Respondent through bank transfers.
- 23. On the basis of the facts set out in para 22 above, we are satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72 (1) of the 2004 Act, namely being a person having control or managing an HMO which was required to be licensed under section 61(1) of the 2004 Act but was not so licensed. An application for an HMO Licence was not duly made until 4th October 2019 when the commission of the offence ceased.

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- 24. Section 30(1) provides that where an Improvement Notice has become operative, the person on whom it was served commits an offence if he fails to comply with it.
- 25. Whilst an Improvement Notice was served on the Respondent on 18th April 2019 and was operative from 23rd May 2019, we have no evidence that the Respondent failed to comply with the Notice either by failing to start remedial action by the required date within the Notice or by failing to complete the remedial action by the required date(s).
- 26. We are not satisfied, beyond a reasonable doubt, that the Respondent has committed an offence under section 30(1) of the 2004 Act.

Entitlement of the Applicants to apply for a Rent Repayment Order

27. We determine that all Applicants were entitled to apply for Rent Repayment Orders. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicants and the offence was committed in the period of 12 months ending with the day on which the applications to the Tribunal were made (28th February 2020 and 9th March 2020). The Applicants have demonstrated by their bank statements that they had paid rent.

Discretion to make a Rent Repayment Order

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

Amount of Rent Repayment Order

29. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 72(1) of the 2004 Act. The Respondent ceased to commit the offence on 4th October 2019 when the application for the HMO licence was duly made. The relevant period during which the offence was committed was therefore 4th October 2018 to 3rd October 2019 inclusive.
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The Applicant has not provided any bank records regarding the period July 2018- 14 Jan 2019. It is stated on her behalf that a friend who was living with her was paying the rent but we have not been provided with such evidence. We have therefore only taken account of the rent for which there is evidence of payment by the Applicant.

Applicant 4 **£2135** from 8.12.18 to 1.6.19

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

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33. We noted the Respondent's assertion that all the Applicants were content and happy to continue with the tenancies having been told by the Respondent of the issues concerned.
34. We do not find anything in the conduct of the Applicants or the Respondent that needs to be taken into account.

Financial

35. Despite seeking details by Further Directions, we were not provided with any details of the Respondent's personal financial circumstances nor any information he wished us to take into account regarding such circumstances. We noted the Respondent's statement regarding the total income of and costs for the Property but with no detail provided as to the detail or breakdown of the costs. We noted the rent he received as income from the Property. There is no explanation of the figure in the bank extract dated 17th December 2019 referenced as 'bill payment to NCC CIS' of £4,748. We had limited evidence on which to assess the Respondent's personal financial circumstances, but are aware from the extract of bank statements between 19th November 2019 and 19th January 2020, that rental payments appear to be received from people other than the Applicants.

Conviction

36. We had no evidence that the Respondent had been convicted of any housing related offences or received any financial penalties.

37. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.
38. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicants in the above amounts within 28 days of the date of this decision, or fail to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicants, then they can recover the amounts in the County Court.

Costs

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

Appeal

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

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Judge T N Jackson