



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

**Case Reference** : **MAN/00CJ/HMF/2019/0084**

**Property** : **59A Second Avenue, Heaton, Newcastle upon Tyne NE6 5XT**

**Applicants** : **Kyle Jones**

**Respondent** : **Dr Nan Lin & Dr Maio Chen**

**Type of Application** : **Application for a Rent Repayment Order by a Tenant**  
**Housing and Planning Act 2016 - Section 41(1)**

**Tribunal Members** : **Mr S Moorhouse LLB**  
**Mr WA Reynolds MRICS**

**Date of Decision** : **12 August 2020**

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**DECISION TO STRIKE OUT**

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## **DECISION**

The Applicant's application for a Rent Repayment Order is struck out for lack of jurisdiction.

## **REASONS**

### **The Application**

1. By an application ('the Application') pursuant to the Housing and Planning Act 2016 ('the 2016 Act'), the Applicant seeks a Rent Repayment Order. The Application was made on the grounds that the Property was let to six tenants without the proper HMO licence. Full rent repayment for the duration of the tenancy was sought.
2. Directions were issued pursuant to which a written statement of case and accompanying documents were submitted by both parties.
3. The Applicant's submission stated that he sought to recover the cost of rent, minus utilities, due to the fact that the Property was an unlicensed HMO. He included a copy letter from Newcastle City Council's Housing HMO Team dated 18 December 2019 together with a copy of his tenancy agreement, bank records and correspondence.
4. The Respondent's submission was accompanied by the copy tenancy agreement, financial records and copy correspondence. In their statement the Respondents cited the case of Bristol City Council -v- Digs (Bristol) Limited [2014] EWHC 869 in support of a contention that the Property comprised only two habitable storeys and was not subject to mandatory licensing. The Respondent stated that there was a previous HMO licence obtained by the previous owner which had not been transferable to them when they purchased the Property and which pre-dated the High Court ruling in the Bristol City Council case.
5. The Respondents submitted that they had applied for a licence on 29 September 2018 due to a change in legislation on 1 October 2018, which had the effect of removing the 'three storey or more' requirement. It was the Respondent's case that no licence was required at the time of the Applicant's tenancy.
6. The Tribunal met on 25 February 2020 to consider the written representations and supporting evidence contained in the parties' submissions. The Tribunal considered it unnecessary in view of the matters in issue, and the available documentary evidence, to conduct an inspection.

### **Further Directions**

7. Having reviewed the papers the Tribunal issued Further Directions, summarising the issues and directing (1) that the Respondent submit documentary evidence of their purchase of the Property in the form of a transfer deed or Official Copy of the Register of Title; and (2) that the Applicant submit any further representations he may wish to make to substantiate his contention that the Respondents were in breach of licensing requirements. The Respondents submitted Office Copy entries however no further representations were submitted by the Applicant.

## **Paper Determination**

8. Rule 31(2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 permits a case to be determined on the papers provided that the parties consent (or do not object when a paper determination is proposed). In this case the parties were content that the matter be determined on the papers and the Tribunal considered it appropriate to do so. Although the parties were not legally represented the issues to be decided were clear from the parties' submissions which set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including relevant issues of fact.

## **Findings of Fact**

9. The Property was licensed for the occupation of 5 tenants from 5 households from 27 March 2014 until 30 August 2018.
10. During the continuance of the licence, the long leasehold title to the Property changed hands. The company Siverfirs Limited, owned by the Respondents, became the registered proprietor on 15 February 2017.
11. On 7 September 2017 the Respondents (in their own names) granted a tenancy of the Property to the Applicant and five co-tenants, for a term commencing 12 September 2017 and ending 30 August 2018.
12. The Property is shown on a plan supplied by the Respondents. It is an upper maisonette, or 'Tyneside Flat', comprising first and second floor accommodation accessed from the rear via a staircase with small 'landing' areas.
13. It was unnecessary for the Tribunal to reach a finding of fact as to whether the rear staircase giving access to the Property was within the building, as seemed to be suggested by the Respondents' reliance upon the Bristol City Council case, or was an external stairway. For the reasons given below this did not alter the Tribunal's decision.

## **The Law**

14. The change in the law on licensing referred to earlier came into effect on 1 October 2018 and is set out in the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. The new definition removed the previous requirement that the HMO (or part) comprises three storeys or more, retained the requirement that the HMO is occupied by 5 or more persons living in 2 or more single households, and incorporated other tests related to the definition of an HMO.
15. The previous 'three storeys or more' requirement, applicable at the time of the Applicant's tenancy, was prescribed by the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006. An extract is included in the Schedule to this decision document.
16. The Bristol City Council case referred to by the Respondents was concerned with whether a maisonette was a licensable HMO. In that case there was a maisonette on the ground and first floors and another on the second and third floors. The case related to the latter. Access to both maisonettes was through the front door to the house at

street level into a shared ground floor lobby or hallway. The second/third floor maisonette was reached through a door from the shared hallway, through a private hallway up a staircase, with a private landing at first floor level - these private hallway and landing areas and the stairs being demised along with the upper maisonette.

17. It was held in the Bristol City Council case that the small areas on the ground and first floors were not 'storeys' and therefore did not fall within paragraph 3(2)(a) of the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006. Alternatively if they were 'storeys' they were not used in connection with or as an integral part of the maisonette.
18. Sections 40, 41, 43 and 44 of the 2016 Act relate to Rent Repayment Orders and extracts from these are set out in the Schedule.
19. Section 40 identifies the relevant offences, including offences under Section 72(1) and section 95(1) of the Housing Act 2004 ('the 2004 Act') - control or management of unlicensed HMO or house. Section 72(1) provides that an offence is committed if a person is a person having control of or managing an HMO required to be licensed which is not licensed. Section 95(1) is an equivalent provision relating to houses subject to selective licensing schemes.

### **Decision to Strike Out**

20. Section 41(1) of the 2016 Act permits a tenant (or local housing authority) to apply to the First-tier Tribunal for a rent repayment order against a person who has committed any of the offences of a description specified in the table set out in section 40(3).
21. There is no evidence before the Tribunal, nor is it claimed by the Applicant, that any of the offences described at rows 1-4 (inclusive) or 7 of the table have been committed by either of the Respondents.
22. The offence described at row 6 of the table relates to houses in an area designated for selective licensing. There is no evidence before the Tribunal, nor is it claimed by the Applicant, that the Property was subject to a selective licensing scheme.
23. The offence described at row 5 of the table relates to Part 2 of the 2004 Act, dealing with mandatory licensing requirements. The offence is committed if a person has control or management of an HMO which is required to be licensed under Part 2 of the 2004 Act but is not licensed.
24. Section 55(2) of the 2004 Act provides that Part 2 applies to the following HMOs in the case of each local housing authority: (a) any HMO in the authority's district which falls within any prescribed description of HMO, and (b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.
25. There is no evidence before the Tribunal, nor is it claimed by the Applicant, that the Property was subject to additional licensing during the term of the Applicant's tenancy.

26. The prescribed description is as set out in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006, and includes the 'three storeys or more' requirement.
27. The Tribunal is satisfied that the living accommodation at the Property is contained in two storeys only, and that there are no internal areas belonging to the Property at ground floor level other than any stairs and small areas of hall and landing that may be enclosed. Applying the Bristol City Council case, any internal stairs and small areas of hall or landing at ground floor level do not constitute a 'storey', nor are they used 'wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO'. Any external area belonging to the Property cannot, in the Tribunal's view, be classed as a 'storey' - this would include access stairs and landings to the extent that they are not enclosed, and any part of the rear yard that belongs to the Property.
28. For these reasons the Tribunal determines that none of the offences of a description specified in the table at section 40 of the 2016 Act have been committed by the Respondents. Accordingly the right to apply to the First-tier Tribunal for a rent repayment order does not arise and the Tribunal has no jurisdiction to make a rent repayment order.
29. Rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states that The Tribunal must strike out the whole or part of the proceedings or case if the Tribunal does not have jurisdiction in relation to the proceedings or case or part of them, and does not exercise a power to transfer the proceedings to another court or tribunal. In the present case a transfer to another court or tribunal is inappropriate, as no other court or tribunal would have jurisdiction to grant the rent repayment order sought by the Applicant.
30. Rule 9(4) states that the Tribunal may not strike out the proceedings without first giving the parties an opportunity to make representations in relation to the proposed striking out. Accordingly notice was given on 7 July 2020 directing that any such representations be made within 21 days of the date of the notice.
31. No representations were received within the 21 day deadline, and indeed as at 11 August 2020 no such representations had been received.
32. For the reasons given above, the Application is struck out.

**S Moorhouse**

Tribunal Judge

## Schedule

### Housing and Planning Act 2016

#### Section 40

(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).....

(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.

*The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 “control or management of unlicensed HMO”*

*Section 72(1) provides: '(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.' 'This Part' refers to Part 2 of the 2004 Act dealing with mandatory licensing.*

*The table described in s40(3) includes at row 6 an offence contrary to s95(1) of the Housing Act 2004 “control or management of unlicensed house”*

*Section 95(1) provides: '(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this part (see section 85(1)) but is not so licensed.' 'This Part' refers to Part 3 of the 2004 Act dealing with selective licensing.*

#### Section 41

(1) A tenant.....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.

## Section 43

(1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

## Section 44

(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.

*The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.*

(3) The amount that the landlord may be required to pay 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.

## **Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018**

### Paragraph 3

(1) An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act where it satisfies the conditions described in paragraph (2).

(2) The conditions referred to in paragraph (1) are that -

(a) the HMO or any part of it comprises three storeys or more;

(b) it is occupied by five or more persons; and

(c) it is occupied by persons living in two or more single households.

(3) The following storeys shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more -

(a) any basement if - .....

(b) any attic if - .....

(c) where the living accommodation is situated in a part of a building above business premises....

(d) where the living accommodation is situated in a part of a building below business premises....

(e) any mezzanine floor not used solely as a means of access between adjoining floors....

(f) any other storey that is used wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO.