



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

Case reference : **LON/00AY/HMF/2020/0033**

HMCTS code : **V: VIDEO**

Property : **72 Abercairn Road London SW16 5AD**

Applicants : **Necy Durand, Miranda Rathmell and
Courteney Darmanin**

Representative : **Justice for Tenants (Mr A. Mcclenahan)**

Respondents : **Collin Smith (1)
Yizhen Li (2)**

Representative : **In person**

Type of application : **Application for a Rent Repayment Order**

Tribunal members : **Judge Pittaway
Mr P Roberts Dip Arch RIBA**

Date of Hearing : **10 July 2020**

Date of decision : **10 August 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the tribunal was referred to are

1. The applicants' application (169 pages)
2. The applicants' supplementary statement of case (79 pages)
3. The applicants' exhibits (26 pages)
4. The respondents' statement of case (40 pages)
5. Documents subsequently submitted by the respondents (30 pages)

the contents of which the tribunal has noted.

Decisions of the tribunal

The tribunal does not make rent repayment orders (“**RROs**”) against the respondents, for the reasons given below.

The background

1. On 6 March 2020 the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“**the 2016 Act**”) for RROs in respect of 72 Abercairn Road London SW16 5AD (“**the Property**”). The London Borough of Lambeth is the local housing authority.
2. The application has been brought by the applicants jointly in respect of the respective periods set out below, during which periods the applicants paid their respective rents to the relevant respondent referred to in respect of each applicant.

| Tenant | Landlord stated to be | Term; and Rent per month | Period in respect of which RRO claimed | Amount claimed |
|-------------|-----------------------|---|--|--------------------------------|
| Necy Durand | Guoyi Li | 6 m from 24/12/2014 at initial rent of £683 per month | 14/09/2018 - 14/09/2019 | £8,559.60 =£713.3 per month |
| | Yizhen Li | 25/9/2016 - 25/9/2017 £700 per month | | |

| | | | | |
|--------------------|--------------|-----------------------------------|---------------------------|-----------|
| | Yizhen Li | 27/2/2018 – 27/2/2019 | | |
| | | £710 per month | | |
| Miranda Rathmell | Collin Smith | 22/09/2018 – 22/09/2019 | 22/09/2018- 22/09/2019 | £7,800.00 |
| | | £650 per month | | |
| Courteney Darmanin | Collin Smith | 10/09/2018- 10/09/2019 | 10/09/2018- 10/09/2019 | £9,187.00 |
| | | £775 per month = £9300 p.a | | |

3. The applicants were in occupation of the property during the dates stated above. All occupied under agreements in which, during the relevant periods, the landlord was named as either Yizhen Li (for Ms Durand) or Mr Smith, and each agreement provided for the relevant applicant to pay her rent to the landlord named in that agreement.
4. The application states that none of the applicants received Housing Benefit or Universal Credit rent contributions.
5. In their application the applicants named Justice for Tenants as their representative. Official copies for the freehold of the property were attached to the application which showed Yizhen Li to be the registered proprietor of the freehold.
6. The application also included an e mail from HMO Licensing London Borough of Lambeth dated 8 November 2019 stating that at that date the property did not have a licence under the mandatory licensing scheme, that it had never held such a licence and that at that date no application had been made for a licence.
7. On 13 March 2020, the Tribunal issued Directions naming all three named landlords as respondents.
8. The directions set out the issues which the Tribunal would need to consider. The respondents were advised to seek independent legal advice. The applicants having already provided a bundle this was sent to the respondents who were directed to file a bundle of documents for use by the tribunal by 20 April 2020,

with the applicants having the right to send a brief reply to the issues raised by the respondents by 11 May 2020.

9. The applicants provided a supplementary statement of case. They also provided sworn witness statements from Ms Rathmell and Ms Durand dated 7 and 8 July 2020 respectively.
10. On 8 July Mr Mcclenahan of Justice for Tenants wrote to the tribunal confirming that Mr Li could be removed as a respondent. In light of this the tribunal directed on 8 July that Mr Li be removed as a respondent.
11. The respondents objected to the late removal of Mr Li and the applicants' late submission of evidence. Procedural Judge Carr considered these objections and confirmed the removal of Mr Li as a respondent and allowed the admission of the applicants' submissions in response to the respondents' case, as the respondents' case had only been completed by them on 25 June.
12. During the hearing the respondents again objected to the admission of the applicants' submissions.

The hearing

13. The tribunal heard evidence from Ms Rathmell and Mr Smith and submissions from Mr Smith and Mr Mcclenaghan.
14. The tribunal has had regard to the statements of case, the witness statements in the bundles, the evidence it has heard and the submissions on behalf of the parties in reaching its decision. As appropriate these are referred to in the reasons for the tribunal's decision.

The Property

15. The Property is described in the application as a 5-bedroom, 3 storey house. From the evidence before the tribunal the house was seen to be a two storey house with a third floor loft extension. As of 1 October 2018 the definition of mandatory licensable HMO changed so that a licence was required where a property was occupied by five or more people forming two or more households, regardless of the number of storeys.
16. No party requested an inspection and the tribunal did not consider that one was necessary.

The law

17. The relevant legal provisions are referred to in the tribunal's decision and reasons and are set out in the Appendix to this decision.

18. In addition the tribunal has had regard to the decision in *P.C. Opara v Ms M Olasemo* [2020] UKUT 0096 (LC) (‘the **Opara** case’)

Evidence and submissions

19. In his opening submissions Mr Mcclenaghan accepted that it was not possible to prove that there had been five occupants at the property after 10 September 2019, the date upon which Ms Darmanin left the Property. As to the number of occupants prior to that date he referred the tribunal to a selection of e mails in the application from Mr Smith dealing with management issues at the property which were addressed to the three applicants and the two occupants who were not applicants in this application, namely Ms C. Geier and Mr C. A. Taylor.
20. Although not apparent from the respondents’ bundles it became clear when Mr Smith made submissions on behalf of both respondents, that their case was based on the submission that the Property was not, during the relevant period, a House in Multiple Occupation.

In his Statement of Reasons for Opposing Application Mr Smith had stated,

‘1. The property was not in breach of the HMO licencing regulation for the period claimed as it had remained to this point in time.’

There was no explanation in the Statement of Reasons for Opposing Application why Mr Smith made this assertion.

21. Mr Smith accepted that there had been five people in occupation of the Property until Ms Darmanin left but in oral submissions submitted that it had not been the only or main residence of any of them except Ms Durand. He further submitted that the property had never been the only or main residence of the two occupants who were not applicants in this application, namely Ms C. Geier and Mr C. A. Taylor.

Mr Smith submitted that it was for the applicants to prove their case beyond reasonable doubt and they had provided insufficient evidence that the property was the main residence of all the occupants. He submitted that both Ms Geier and Mr Taylor had other main residences, referring to Mr Taylor having a wife and child living elsewhere. He pointed the tribunal to the fact that the bank statements of Ms Rathmell and Ms Darminin showed their respective addresses not to be that of the Property, suggesting that this indicated that they had other residences. He drew the tribunal’s attention to the absence of any correspondence with the five occupants during the last five months of the relevant period. He also drew the tribunal’s attention to the agreements with Ms Rathmell and Ms Darminin, both of which contain an acknowledgement, under the heading ‘BACKGROUND B.’ that; ‘The tenant acknowledges that this tenancy is not an assured or an assured shorthold tenancy’. This contradicts their respective Supplementary Statements of Case which each state at paragraph 11 that they all occupied under assured shorthold tenancies. He

submitted that given the property's location (near public transport) and that none of the occupants were in receipt of housing benefit the property was not one where the occupants were unlikely to have another residence; it could be used as somewhere to live during the week for work purposes.

22. The respondents had not cross-examined either Ms Durand or Ms Rathmell when given the opportunity to do so. The tribunal asked Ms Rathmell whether she would be prepared to be questioned further on the issues raised by Mr Smith and she agreed.
23. Ms Rathmell gave evidence that the Property had been her main residence when she lived there. It was the first property that she lived in after coming to London and as it was shared with people that she did not know she elected to retain her mother's address as the place to which her bank statements were sent.

Insofar as Ms Geier and Mr Taylor were concerned she said she believed the property to be their respective main residences. Ms Rathmell said that she understood that Mr Taylor spent periods of time abroad and that he had a partner and child living abroad. Asked about his having a wife and child living elsewhere she said that she understood that Mr Taylor was divorced from his wife.

24. There was evidence before the tribunal that the respondents applied for an HMO Licence on 8 November 2019. When asked why they had done so Mr Smith said that it was the easier and safer course of action even if the property did not need the licence.
25. Both Mr Mcclenaghan and Mr Smith drew the tribunal's attention to the decision in the *Opara* case as to the burden of proof that offences have been committed. Mr Smith referred to the case as authority for the need for the applicants to prove beyond reasonable doubt that the property had been used by all the occupants as their main residence. Mr Mcclenaghan referred the tribunal to paragraph 46 of the decision; and the ability for inferences to be drawn from the evidence as to the circumstances of the other tenants.
26. Mr Mcclenaghan also referred the tribunal to section 260 of the 2004 Act ('HMOs: presumption that sole use condition or significant use condition is met') in support of his proposition that there is a presumption that the property was occupied as the occupants' main residence, unless the contrary is shown.

The tribunal's decision and reasons

Alleged late submission of the applicants' response to the respondents' statement of case.

27. There is no reason for the tribunal to depart from Procedural Judge Carr's decisions of 8 July when she had considered the respondents' objections.

Procedural Judge Carr had confirmed the removal of Mr Li as a respondent and allowed the admission of the applicants' submissions in response to the respondents' case, as the respondents' case had only been completed by the respondents on 25 June, and the original directions had contemplated that the applicants would have 14 days in which to reply to the respondents' case.

28. The respondents complained that they had not had time to take legal advice, but the tribunal note that the Directions of 13 March advised them to do so, effectively four months before the hearing took place.

Has an offence to which the 2016 Act applies been committed?

29. Under section 41(1) of the 2016 Act a tenant may apply to the tribunal for a RRO against a person who has committed an offence to which that Chapter of the 2016 Act applies.
30. Section 40(3) of the 2016 Act sets out the offences to which that Chapter of the 2016 Act applies. These include committing an offence under section 72(1) of the 2004 Act, by being a person having control of or managing an HMO which is required to be licensed but is not so licensed.
31. Under section 55 (2) (a) of the 2004 Act HMOs must be licensed if they fall within the prescribed description of an HMO. Under both The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order (2006) and The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 an HMO is of the prescribed description if it is occupied by five or more persons and meets the standard test set out in section 254 of the 2004 Act.
32. For the property to meet the standard test set out in section 254 of the 2004 Act the five occupants of the property must have occupied it as their only or main residence, or that they are to be treated as so occupying it, during the relevant period. This was the issue before the tribunal to decide.
33. Under section 43(1) of the 2016 Act the tribunal may only make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which that Chapter of the 2016 Act applies (whether or not the landlord had been convicted of an offence).

It is for the applicants to prove that the respondents have committed an offence, and to do this they must make the tribunal sure that an offence has been committed.

34. The tribunal is not satisfied beyond reasonable doubt that an offence has been committed to which the 2016 Act applies.

35. The application states; ‘the tenants formed more than one household who occupied the property as their main residence and shared amenities.’ All three applicants had signed statements of truth attached to the application.
36. Conversely the Applicants’ Supplementary Statement of Case, states, “10.d. The Property was the applicants’ main residence.”
37. The sworn witness statement from Ms Rathmell dated 7 July 2020 states, ‘5. All tenants occupied the property as their main residence.’ The sworn witness statements of Ms Durand dated 8 July states, ‘5. All tenants occupied the property as their main residence.’ There was no sworn witness statement from Ms Darminin. Mr Smith submitted that the absence of a sworn statement from Ms Darminin suggested that she was unable to swear such a statement.
38. On the basis of the statements of truth and sworn witness statements before it and the evidence that the tribunal heard from Ms Rathmell the tribunal finds as a matter of fact that the property was the only or main residence of Ms Rathmell and Ms Darminin. Mr Smith did not dispute that it was also Ms Durand’s main residence. The position is different in so far as the other tenants are concerned.
39. The tribunal does not consider that there is clear evidence before it as to whether Ms Geier and Mr Taylor each used the Property as their only or main residence. It accepts Mr Smith’s evidence that he does not believe that Ms Geier and Mr Taylor used the property as their respective main residences. It notes that the Supplementary Statement of Case only refers to the applicants using the property as their main residence, but the statements of truth from Ms Durand and Ms Rathmell refer to all the tenants occupying the property as their main residence. It notes the absence of a sworn witness statement from Ms Darminin (who was not present at the hearing). Ms Rathmell believed the property to be the main residence of Ms Geire and Mr Taylor, but there was no evidence before the tribunal to support this belief. The applicants could have provided evidence in this regard but did not do so.
40. On the evidence before it the tribunal is not satisfied to the requisite standard of proof whether Ms C. Geier and Mr C. A. Taylor occupied the property as their only or main residence. The test clearly set out in the statute is that the standard of proof to be applied is the criminal standard, namely beyond reasonable doubt. It has concluded that the applicants have failed to satisfy the tribunal that all five occupants lived in the property as their main residence for the reasons set out above.
41. In reaching its decision the tribunal has had regard to the decision in the *Opara* case, in which it was observed that tribunals should not be over-cautious in drawing inferences from evidence. In that case there was evidence before the tribunal, and accepted by it, as to the basis of occupation of all the occupants. It was considered that the type of accommodation was such that it was not likely that the occupants would have another home and the payment of housing benefit to one predicated that he should not have another home.

42. In the *Opara* case it was stated that there was strong evidence from which it could be inferred that the appellants lived at the property as their main or only residence. There is no such strong evidence before the tribunal in this case. The tribunal has heard no evidence from Ms Geier and Mr Taylor. They did not attend the hearing and no witness statements were provided from them. The applicants accepted that Mr Taylor spent periods of time abroad with a partner and child, and did not dispute that Mr Taylor had a wife and child living in other accommodation, although they believed that he was no longer living with them. The tribunal accept that Mr Smith's submission that the type of accommodation in the *Opara* case differed from that provided by the instant property, and may be occupied by someone not as their main or only residence. No occupant of the subject property was in receipt of either Housing Benefit or Universal Credit rent contributions. In this case the tribunal does not have knowledge of material facts to enable it to conclude or infer that this was the only or main residence of Ms Geier and Mr Taylor.
43. The tribunal considers that section 260 of the 2004 Act is not relevant as it does not refer to a presumption in respect of the property being used as an occupant's main residence. It only relates to presumptions as to whether a sole use condition or a significant use condition has been met.

Name: Judge Pittaway

Date: 10 August 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of Relevant Legislation

Housing Act 2004

55 Licensing of HMOs to which this Part applies

- (1) This Part provides for HMOs to be licensed by local housing authorities where—
- (a) they are HMOs to which this Part applies (see subsection (2)), and
 - (b) they are required to be licensed under this Part (see section 61(1)).
- (2) This Part 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.
- (3) The appropriate national authority may by order prescribe descriptions of HMOs for the purposes of subsection (2)(a).
- (4) The power conferred by subsection (3) may be exercised in such a way that this Part applies to all HMOs in the district of a local housing authority.

56 Designation of areas subject to additional licensing

- (1) A local housing authority may designate either -
- (a) the area of their district, or
 - (b) an area in their district,
- as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

61 Requirement for HMOs to be licensed

- (1) Every HMO to which this Part applies must be licensed under this Part unless—
- (a) a temporary exemption notice is in force in relation to it under section 62, or
 - (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

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.

254 Meaning of “house in multiple occupation”

- (1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if—
- (a) it meets the conditions in subsection (2) (“the standard test”);
 - (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
 - (c) it meets the conditions in subsection (4) (“the converted building test”);
 - (d) an HMO declaration is in force in respect of it under section 255; or
 - (e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if—

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

Section 260 HMOs: presumption that sole use condition or significant use condition is met

(1) Where a question arises in any proceedings as to whether either of the following is met in respect of a building or part of a building—

- (a) the sole use condition, or
- (b) the significant use condition,

it shall be presumed, for the purposes of the proceedings, that the condition is met unless the contrary is shown.

(2) In this section—

(a) “the sole use condition” means the condition contained in—

(i) section 254(2)(d) (as it applies for the purposes of the standard test or the self-contained flat test),
or

(ii) section 254(4)(e),

as the case may be; and

(b) “the significant use condition” means the condition contained in section 255(2) that the occupation of the living accommodation or flat referred to in that provision by persons who do not form a single household constitutes a significant use of that accommodation or flat.

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 has committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –

- (a) repay an amount of rent paid by a tenant, or
 - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

| | <i>Act</i> | <i>section</i> | <i>general description of offence</i> |
|---|-----------------------------------|---------------------------|--|
| 1 | Criminal Law Act 1977 | section 6(1) | violence for securing entry |
| 2 | Protection from Eviction Act 1977 | section 1(2), (3) or (3A) | eviction or harassment of occupiers |
| 3 | Housing Act 2004 | section 30(1) | failure to comply with improvement notice |
| 4 | | section 32(1) | failure to comply with prohibition order etc |
| 5 | | section 72(1) | control or management of unlicensed HMO |
| 6 | | section 95(1) | control or management of unlicensed house |
| 7 | This Act | section 21 | breach of banning order |

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

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.

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.

| <i>If the order is made on the ground that the landlord has committed</i> | <i>the amount must relate to rent paid by the tenant in respect of</i> |
|---|---|
| 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.