



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

Case reference : **LON/00AG/HMG/2019/0022**

HMCTS code : **V: VIDEO**

Property : **6 Rosemary House, Leighton Road,
Camden NW5 2UX**

Applicants : **Alvaro Gestoso Rodriguez, Alberto
Calderon Gonzalez, Xochilt Armenta,
Reinis Ziedins, Anais Loue.**

Representative : **Justice for Tenants, Mr A. Mcclenahan**

Respondent : **Adebayo Awolaja**

Representative : **Mr Bates, of counsel**

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

Tribunal members : **Judge Pittaway
Ms S Coughlin MCIEH**

Date of Hearing : **30 September 2020**

Date of decision : **18 November 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: CVPREMOTE. 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 before the tribunal at the hearing, the contents of which the tribunal has noted, were;

1. The applicants' application (95 pages)
2. Directions dated 23 September 2019
3. The applicants' statement of case with witness statements and exhibits (168 pages)
4. The respondent's response to alleged offence dated 3 June 2020 (45 pages)
5. The respondent's response to the applicants' witness statements dated 8 June 2020 (132 pages).
6. The applicants' response to the respondent's submissions (10 pages)
7. The respondent's supplemental bundle (64 pages)
8. The response to the respondent's submissions (3 pages)
9. The respondent's 'Indexed Insanity Defence Evidence Supplement Bundle' (21 pages)
10. The skeleton argument of Mr Bates on behalf of the respondent.

At the hearing Mr Mcclenahan represented the applicants and Mr Bates represented the respondent. None of the applicants, nor the respondent, gave evidence to the tribunal. The tribunal heard submissions from Mr Bates and Mr Mcclenahan, and subsequent to the hearing received submissions from Mr Mcclenahan in relation to the respondent's insanity defence.

At the start of the hearing it became clear that the tribunal had not been provided with the respondent's statement of 22 January 2020. It was agreed that this would be provided to the tribunal subsequently. Mr Bates had not seen the response to the respondent's submissions (referred to at 8. above) and Mr Mcclenahan had not received Mr Bates' skeleton argument (referred to at 10. above). The tribunal therefore adjourned to allow each representative to look at the document they had not seen previously. Mr Mcclenahan submitted that he had been unaware that Mr Bates would be submitting that the respondent had a defence of insanity, or a reasonable excuse for being in control/management of an unlicensed HMO. The tribunal decided, with the parties' agreement, to proceed with the hearing but to direct that Justice for Tenants made submissions on these points within 14 days after the hearing after which the tribunal would reconvene to reach its decision, having regard to these submissions. The tribunal received submissions on the respondent's insanity defence dated 13 October.

During the hearing the issue arose as to apportionment of sums paid outside the period for which the RRO was claimed but which related to that period should be treated. Reference was made to *Ellis v Rowbotham* [1900] 1 QB 740 and *Marks & Spencer plc v BNP Paribas Securities Services* [2016] AC 742 and Mr Bates provided Mr Mcclenahan and the tribunal with copies of these authorities after the hearing.

Decisions of the tribunal

1. The defence of insanity is not available to the respondent in relation to the offence being committed by him under section 72(1) 2004 Act.
2. The respondent's mental health was relevant to the defence of reasonable excuse, as to the period during which the offence was committed, and in determining the amount of the Rent Repayment Order.
3. The tribunal determines that the applicants are entitled to a Rent Repayment Order in the sum of £10,611.37 .
4. The tribunal determines that the respondent shall pay the applicants £300 in respect of the reimbursement of the tribunal fees paid by the applicants

The background

5. On 9 September 2019 the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“**the 2016 Act**”) for a rent repayment order (“**RRO**”) in respect of 6 Rosemary House, Leighton Road, London NW5 2UX (‘the **Property**’). The London Borough of Camden is the local housing authority.
6. 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 respondent.

Tenant	Period in respect of which RRO claimed	Amount claimed
Alvaro Gestoso Rodriguez	6/09/18 – 9/07/19	£7,150.00
Alberto Calderon-Gonzalez and Xochilt del Rosal Armenta	27/08/18 – 29/06/2019	£8,696.00
Anais Loue	22/03/2019 – 16/07/2019	£2,557.45
Reinis Ziedins	11/12/2018 – 3/01/2019	£500

7. The applicants seek a total repayment of £18,903.45.

8. The applicants were in occupation of the property during the dates stated above.
9. 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 Adebayo Adetokunbo Awolaja to be the registered proprietor of a long leasehold interest in the Property.
10. On 23 September 2019, the Tribunal issued Directions.
11. The directions set out the issues which the Tribunal would need to consider. The respondent, having been sent the application and supporting documents by the tribunal, was advised to seek independent legal advice. The applicants were directed to file a bundle of documents for use by the tribunal by 1 November 2019, and the respondent to file a bundle of documents by 29 November 2019. The applicants were given the right to send a brief reply to the issues raised by the respondents by 6 December 2019.
12. Further directions were issued on 29 May 2020.
13. The applicants' bundle set out that the application was being made under section 41 of the 2016 Act: having control of or managing an unlicensed HMO under s.72(1) Housing Act 2004 (the '**2004 Act**'). The Property is situated within the additional licensing area designated by LB of Camden, which additional licensing came into force on 8 December 2015. On 30 October 2019 Camden wrote to the occupiers of the Property stating that at 22 May 2019 the Property was occupied as an HMO and that no application for an HMO licence had been received. An offence was therefore being committed under section 72(1) of the 2004 Act.
14. The applicants seek repayment of the rent paid by 'in the 12 months before the breach' and the amount sought by each tenant is set out in the table above. They also seek the refund of the application fee of £100 and the hearing fee of £200.

The Property

15. The Property is described in the application as a 5-bedroom flat in a purpose built block of flats.
16. No party requested an inspection and the tribunal did not consider that one was necessary.

The tribunal's decision and reasons

17. The tribunal has had regard to the statements of case, the witness statements in the bundles, and the submissions made at and after the hearing on behalf of

the parties, and the case law referred to in reaching its decision. As appropriate these are referred to in the reasons for the tribunal's decision.

18. The legal provisions referred to in the tribunal's decision and reasons are set out in the Appendix to this decision.
19. Mr Bates accepted that between 8 September 2018 and 15 July 2019 a continuing offence was being committed under section 72(1) of the 2004 Act; an HMO licence should have been obtained for the property and that no such licence had been obtained. He submitted that it is the respondent's case that his mental illness was such that he was not committing an offence. If that is wrong, his mental illness provided a reasonable excuse for failure to obtain a licence. If that is wrong the respondent disputes the quantum of the rent repayment order.
20. Mr Bates accepted that an offence under section 72(1) under the 2004 Act is one of strict liability. Such offences are an exception to the general rule that requires both proof of the criminal act and intent to act in a criminal manner. He accepted that there is no requirement to show that the respondent knew that he was operating/controlling an unlicensed HMO, citing *R (Mohammed) v Waltham Forest LBC* [2020] 1 W.L.R. 2929 (**'Mohammed'**). He referred the tribunal to *Loake v CPS* [2018] 1 Cr. App. R.16 (**'Loake'**), and in particular to the statement in that case that the correct position is that a person does not commit an offence if, 'at the time of the commission of the act in question [the person was] labouring under a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know it was wrong'. Mr Bates submitted that there was the evidence of significant mental illness affecting the applicant at all material times, and that the tribunal cannot be satisfied beyond reasonable doubt that the offence was being committed at the relevant time.
21. In his submissions Mr Mcclenahan accepted that the respondent had been under medical care and supervision since 18 October 2018 and noted that he had been sectioned on 18 September 2019. He submitted that none of the medical professionals considered that the respondent's mental health required their intervention until he was detained under the Mental Health Act 1983 for the purposes of assessment in September 2019. Mr Mcclenahan made specific reference to the letter from Dr Graham Pickup, a consultant clinical psychologist of 3 January 2020 which referred to him suffering from increased levels of 'stress, worry, insomnia and distractibility' at the time when he was alleged to have committed an offence under section 72 of the 2004 Act in May 2019. Mr Mcclenahan submitted that Dr Pickup does not say in the letter that his client was not responsible for the breach by reason of his insanity or diminished mental capacity. It is Mr Mcclenahan's submission that during the period the subject of the current application the respondent himself was able to deal with the letting of his property on a room by room basis, including drawing up the tenancy contracts himself and receiving the rents and deposits. The respondent did not act as if he was someone who is so distracted or unable to deal with regulation or authority that he should not be held responsible for a breach of law.

22. The tribunal finds that while on the balance of probabilities the respondent did suffer from mental illness during the relevant period there is not sufficient 'cogent psychiatric evidence' before it for the tribunal to conclude that this amounted to insanity throughout the relevant period. As confirmed by *Loake* at paragraph 21, 'The burden of establishing the defence of insanity lies upon the defendant, on the balance of probabilities.' Further, *Loake*, at paragraph 63 states, 'In the absence of cogent psychiatric evidence about the specific relevant aspects of the defendant's mental state throughout his alleged course of conduct, we would expect magistrates and judges to deal robustly with claimed defences of insanity.' Dr Pickup's letter refers to the respondent's mental health having been affected by distressing beliefs that he was being harassed by various agencies following a data breach in 2018. He does not include the London Borough of Camden as one of those agencies. Prior to Dr Pickup's letter the evidence before the tribunal as to the respondent's mental state is contained in a letter dated 30 December 2019 from Dr Catherine King, an associate specialist in the Early Intervention Service which refers to his having first been seen by that service in October 2018 and that he had been ill for some time before he was seen by the service, without being more specific.
23. Mr Bates submitted that there is a statutory defence to the offence of being in control/management of an unlicensed HMO, of 'reasonable excuse' under section 72(5) of the 2004 Act, and that following *Mohammed* a 'reasonable excuse' can include being unaware of the need to obtain an HMO licence. He referred the tribunal to the letter dated 30 December 2019 from Dr King, in which she refers to the respondent having first been seen by that service in October 2018, and that he had been ill for some time before he was seen by the service. Mr Bates submitted that the respondent's mental illness, if not amounting to insanity, might so impact on his judgement and his ability to organise his affairs, both of which would be highly relevant to his appreciating the need to obtain an HMO licence.
24. Mr McClennahan submitted that the respondent's ability to let the property, lodge an appeal in another matter with the tribunal, and navigate the free legal advice services were not the acts of someone who was so distracted that he was unable to deal with regulation or authority.
25. The tribunal find that after 19 June 2019 the respondent had a reasonable excuse for operating/managing the property without an HMO Licence. It notes that in the decision in *Mohammed* (paragraph 48), the prosecution did not have to prove that the defendant knew he controlled/managed an HMO, but that this absence of knowledge might be relevant to the defence of reasonable excuse. The tribunal had evidence before it that on 19 June 2019 the respondent wrote to the building control department of the London Borough of Camden, stating that he had been informed by Mr McIntyre the Environmental Health Officer that he was operating an HMO without a licence and looking to apply for a Building Regulations Completion certificate. This was not the correct procedure to follow but the tribunal find that the respondent's mental state may have led to his taking this incorrect course of action. The tribunal accordingly find that the period during which the offence was committed was from 8 September 2018 to 19 June 2019.

26. Insofar as the quantum of the RRO is concerned Mr Bates accepted that the tribunal was bound by the decision in *Vadamalayan v Stewart* [UKUT] 183 (LC) (*'Vadamalayan'*). Accordingly, the starting point for the calculation of the quantum is the rent paid during the relevant period (to a maximum of 12 months) less the deductions permitted by that decision, which Mr Bates submitted in this case were the payments to British Gas, Council Tax and Broadband, pro-rated appropriately. He submitted that the tribunal should not penalise the respondent by reason of his conduct towards the tenants, as this was explicable by reason of his poor mental health.
27. Mr Mcclenahan submitted that section 44(4) of the 2016 Act, which requires the tribunal when determining the amount to have regard 'in particular' to the conduct of the landlord, did not preclude the tribunal from considering other factors and that the tribunal might take into account the mental health issues that the respondent experienced, particularly towards the end of the relevant period, and invited the tribunal to consider a deduction of between 10 and 20% from the amount of rent claimed as reasonable in the circumstances.
28. The total rent paid by the applicants during the period from 8 September 2018 to 19 June 2019 was £16,851.94, calculated as set out below. In calculating this sum the tribunal has had regard to section 44(3)(a) of the 2016 Act which states that, 'The amount that the landlord may be required to repay in respect of a period must not exceed the rent in respect of that period.' The tribunal have therefore apportioned rent paid by the applicants to the rent in respect of the period during which it finds that the offence was committed.

Tenant	Period in respect of which RRO may be claimed	Amount paid
Alvaro Gestoso Rodriguez	8/09/18 – 19/06/19 9 months and 12 days	£6106.44 (9 x £650 + 256.44)
Alberto Calderon-Gonzalez and Xochilt del Rosal Armenta	8/09/18 – 19/06/2019 9 months and 12 days	£8105.86 (Total paid between 27/8/18 to 29/06/19 £8696 less 13 days off payment made on 27/8 of £277.81; and less 10 days off payment made 29/06 of £312.33)

Anais Loue	22/03/2019 – 19/06/2019	£2139.64 Total paid between 22/03/19 and 19/06 = 2057.45 + 5 days @ £500 pm (£82.19) = £2139.64
Reinis Ziedins	11/12/2018 – 3/01/2019	£500

29. Insofar as permitted deductions are concerned the parties agreed a rate of £100 per month for gas and electricity. Council tax of £120.26 per month was paid. As a resident landlord the respondent would have had to pay council tax for the property in any event, but at a discounted rate if in sole occupation. Broadband was claimed but no evidence was provided to the tribunal as to the amount paid for broadband which the respondent would have had in any event. The tribunal have therefore attributed a cost of £20 per month to this. The tribunal were offered no pro-rated figures to reflect the resident landlord nor the differing number of occupants from time to time at the property. It has therefore adopted a blended discount of 25% to each of the above figures, resulting in permitted deductions of £180.20 per month, totalling £1,692.84 for the 9 months and 12 days from 8 September 2018 to 19 June 2019.
30. Accordingly the maximum net rent the subject of the RRO is £15,159.10.
31. The tribunal accepts that the respondent's mental health is a factor which should be taken into account; either under Section 44 (4) of the 2016 Act which requires the tribunal to have regard to the conduct of the landlord or, as Mr Mcclenahan submitted, as a further factor to which the tribunal should have regard. In all the circumstances, and having regard to Mr Mcclenahan having proposed a reduction of up to 20%, the tribunal consider it appropriate to discount the maximum net rent by 30% to £10,611.37 .
32. Section 44(4) also requires the tribunal to have regard to the respondent's financial circumstances. The respondent's response to the applicants' witness statements referred to his having lost his job as a Sainsbury Online Delivery Driver as a result of having been sectioned under the Mental Health Act, his driving license being revoked by reason of his psychiatric illness. He stated that as at 15 June 2020 he had debts of £11,586.37 and fixed monthly outgoings of £866.56. Mr Bates invited the tribunal to conclude that the respondent was a 'man of modest means so that a further deduction is justified'. Mr Bates did accept that there was little evidence before the tribunal as to his client's means.

33. In the absence of better evidence about the respondent's financial circumstances the tribunal makes no further deduction from £10,611.37 to reflect the respondent's financial circumstances.
34. The applicants having properly made an application for an RRO the tribunal allows their application for the reimbursement of their fees in the sum of £300.

Name: Judge Pittaway

Date: 18 November 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.

Housing and Planning Act 2016

40 Introduction and key definitions

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

	<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

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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.