FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**NS/LON/00BJ/HMF/2020/0031** **FVH/Remote**
Property	:	**58 Selkirk Road, London SW17 0ES**
Applicants	:	**Ms Marzena Piersa**
Representative	:	**In person**
Respondent	:	**(1) Mr. Jan Ahmad** **(2) Nest Estates Limited**
Representative	:	**(1) Faisel Sadiq of Counsel** **(2) Justin Shale of Counsel**
Interested person	:	-
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	:	**Judge Professor Robert Abbey** **Mr Peter Roberts Dip Arch RIBA**
Venue and date of hearing	:	**10 Alfred Place, London WC1E 7LRby remote video hearing; 30 October 2020**
Date of decision	:	**09 November 2020**

DECISION

Decision of the tribunal

(1) The tribunal finds that a rent repayment order be made in the sum of £4360.16 in favour of the applicant, the tribunal being satisfied beyond

reasonable doubt that the first and second respondents have committed an offence pursuant to s.72(1) of the Housing Act 2004, namely that a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwellings. The first respondent must pay 50% of the rent repayment order in the sum of £2180.08 and the second respondent must pay 50% in the sum of £2180.08.

Reasons for the tribunal's decision

Introduction

1. The applicant made an application for a rent repayment order pursuant to the terms of s.41 of the Housing and Planning Act 2016 in respect of a property known as **58 Selkirk Road, London SW17 0ES**.

2. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.

3. The hearing of the application took place on Friday 30 October 2020. All three parties appeared, two with representatives as more particularly described above.

4. Rights of appeal are set out in the annex to this decision and relevant legislation is set out in an appendix to this decision.

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as FVHREMOTE - use for a hearing that is held entirely on the Ministry of Justice Full Video Hearing platform with all participants joining from outside the court. A face to face hearing was not held because it was not possible due to the Covid -19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions. The bundle was supplemented by some additional documents submitted in the week prior to the hearing.

Background and the law

6. Section 41 of the Housing and Planning Act 2016 allows tenants to apply to the Tribunal for a rent repayment order. The Tribunal must be satisfied beyond reasonable doubt that a person/company has committed an offence described in Part two of the Act and in that regard section 72 of the 2004 Act states: -

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.

7. Under section 41 (2) (a) and (b) of the 2016 Act 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. The application to the Tribunal was made on 2 March 2020. By Directions of the Tribunal the second respondent was joined in as a third party along with the applicant and the first respondent. From the evidence before it the Tribunal was satisfied that the alleged offence occurred in the period of 12 months ending with the day on which the application was made to the Tribunal. (The applicant seeks a rent repayment order from 1 October 2018 until 18 June 2019 when she vacated the property).

8. On 18 September 2020 the London Borough of Wandsworth imposed a financial penalty on the second respondent pursuant to s249a of the Housing Act 2004 as a result of it finding that the second respondent was guilty of an offence of operating an unlicensed HMO contrary to s72 of the Housing Act 2004. The penalty was £4000.

9. At page 91 of the trial bundle the applicant set out the amount of the rent she claimed and the Tribunal approved her calculation in the sum of £4360.16. She also supplied to the Tribunal proof of payment on pages 89 and 90 of the trial bundle. The Tribunal were satisfied that these payments had indeed be made.

10. It was agreed by the parties that the property only needed to be licensed as an HMO from 1 October 2018 and hence the period of the claim by the applicant. Furthermore, Counsel for the second respondent confirmed in his skeleton argument that "*It is accepted that neither the First or Second Respondent applied for an HMO licence during the period 1/10/18 to 18/6/19 and if the property was occupied by 5 or more persons from different households then the property would require an HMO Licence*". Accordingly, there was no issue before the tribunal as to the need for a licence. The property was occupied by 5 tenants and was clearly an unlicensed HMO.

11. The applicant also sought to assert a ground for the application on the basis of harassment. However, as the Tribunal was able to find an offence arising from the failure to licence the property it did not need to consider this aspect further, it being satisfied that there had been an offence entitling the tenant applicant to apply for a rent repayment order.

<u>The Offence</u>

12. There being a house as defined by statute, then a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the Act but is not so licensed. The first respondent and the second respondent have therefore committed an offence under section 72 (1) of the Housing Act 2004 (as amended by the Housing and Planning Act 2016) as the first respondent was in control of an unlicensed property and the second respondent was a person managing an unlicensed property. The Tribunal relies upon the Upper Tribunal decision in the case of *Goldsbrough and Swart v CA Property Management Ltd and Gardner* [2019] UKUT 311(LC) in making this finding.

13. In the Upper Tribunal Judge Elizabeth Cooke found that where the alleged offence is controlling or managing an unlicensed HMO, an RRO can only be made against a landlord of the property in question. While a managing agent cannot be a landlord, she concluded that the definition of a landlord, for the purposes of the 2016 Act, included both the tenants' immediate landlord and the freehold owners of the property, in circumstances where the freehold owners had granted a lease of the property to the tenants' immediate landlord, who then entered into tenancy agreements with the tenants. This is precisely the situation that arose in this case and therefore the case applies thus enabling the Tribunal to make a decision that affects both respondents.

14. To assist I quote some paragraphs of Judge Cooke's decision: -

> *"31. I also agree that a managing agent that does not have a lease of the property cannot be a landlord. If that is what the government guidance, quoted at paragraph 23 above, is intended to say then it is correct. But if it is intended to say that an intermediate lessee, who is the landlord of the applicants but the sub-tenant of the freeholders (or indeed of another superior lessee) cannot be subject to an RRO than that would appear to be incorrect and misleading. It would be very helpful for that guidance to be clarified.*
>
> *32. Where I part company with the FTT is in its restriction of liability to an RRO to "the landlord" of the occupier. That is not what the 2016 Act says. The only conditions that it sets for liability to an RRO are, first, that the person is "a landlord" and second that that person has committed one of the offences. Certainly the person must be a landlord of the property where the tenant lived; section 41(2)(a) requires that the offence relates to housing that, at the time of the offence, was let to the tenant. It does not say that the person must be the immediate landlord of the occupier; if that was what was meant, the statue would have said so.*
>
> *35. If the only possible respondent were the landlord who held the immediate reversion to the tenant, it would be possible for a freeholder to set up a situation where a rent repayment order could not be made, by first granting a lease of the property to a company that is not in control of, nor managing, the property and is ineligible*

for an HMO licence, and then having that company grant the residential tenancies…."

15. In the light of the above, the Tribunal took time to carefully consider the evidence regarding the absence of a licence but came to the inescapable conclusion that none had been issued by the Council. Therefore, the Tribunal concluded that this was an unlicensed property in relation to this application. Accordingly, the tribunal had no alternative other than to find that both the respondents were guilty of the criminal offence contrary to the Housing Act 2004.

The tribunal's determination

16. The amount of the rent repayment order was extracted from the amount of rent paid by the applicant during the period of occupancy as set out in a rent statement within the trial bundle where the rent actually paid was stated to be £4360.16. This represents the maximum sum, (£100%), that might form the amount of a rent repayment order.

17. In deciding the amount of the rent repayment order, the Tribunal was mindful of the guidance to be found in the case of *Parker v Waller and others* [2012] UKUT 301 (LC) as to what should the Tribunal consider an appropriate order given the circumstances of the claim. Amongst other factors the tribunal should be mindful of the length of time that an offence was being committed and the culpability of the landlord is relevant; a professional landlord is expected to know better. From the evidence before it provided by the applicants the Tribunal took the view that the first respondent was not a professional landlord.

18. Having said that, when considering the amount of a rent repayment order the starting point that the Tribunal is governed by is s.44(4), which states that that the Tribunal must "in particular, take into account" three express matters, namely:

> (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.

. The Tribunal must therefore consider the conduct of the parties and the financial circumstances of the respondent.

19. The Tribunal were mindful of the recent Upper Tribunal decision in *Vadamalayan v Stewart and Others* [2020] UKUT 183 (LC). In particular Judge Elizabeth Cooke said: -

12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.

14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

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. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. There may be a case, as I said at paragraph 15 above, for deducting the cost of utilities if the landlord pays for them out of the rent (which was not the case here). But there is no justification for deducting other expenditure. The appellant incurred costs for his own benefit, in order to get a rental income from the property; most were incurred in performance of the appellant's own obligations as landlord. The respondents as tenants were entitled to the items set out in the appellant's schedule of expenditure (insofar as they do relate to the property; in the circumstances I do not have to resolve disputes of fact for example about item 8). The respondents are entitled to a rent repayment order. There is no reason to deduct what the appellant spent in meeting one obligation from what he has to pay to meet the other.

54. The appellant also wants to deduct what he had to pay by way of mortgage payments to the TSB and interest on another loan which has not been shown to relate to the property. The FTT refused to deduct the mortgage payments because the mortgage was taken out in 2016 whereas the property was purchased in 2014, so that the mortgage did not appear to have funded the purchase. The appellant says that the property was bought some years before that and that this was a re-mortgage. He did not produce evidence about that to the FTT and he could have done so. More importantly, what a landlord pays by way of mortgage repayments – whether capital or, as in this case, interest only – is an investment in the landlord's own property and it is difficult to see why the tenant should fund that investment by

way of a deduction from a rent repayment order. The other loan has not been shown to relate to the property and I regard it as irrelevant, as did the FTT.

20. In the light of the above when considering financial circumstances, the Tribunal should not consider profit, mortgage payments or reasonableness. So, the Tribunal did not take account of any of these points when coming to the amount of the rent repayment order. The tribunal could not see any justification for a deduction for any outgoing even though mention was made of an estimated sum of £250 for the whole house per month. The conduct of the respondents did not seem to justify this allowance.

21. The Tribunal then turned to the matter of the conduct of the parties. The landlord should have licenced this property but didn't. This is a significant factor even though the first respondent said he relied upon his agents in all matters relating to the letting of the property. However, it still remains the case that this property should have been licenced and ignorance of the law does not assist the first respondent, he remains liable.

22. Consequently, while the Tribunal started at the 100% level of the rent it thought that there were no reductions that might be appropriate, proportionate or indeed necessary to take account of the factors in the Act. Therefore, the Tribunal decided particularly in the light of the absence of a licence that there should be no reduction from the maximum figure of £4360.16 giving a final figure of 100% of the claim. This figure represents the Tribunals overall view of the circumstances that determined the amount of the rent repayment order.

23. Consequently, the Tribunal concluded that a rent repayment order be made in the sum of £4360.16 the tribunal being satisfied beyond reasonable doubt that the first and second respondents had both committed an offence pursuant to s.72 of the Housing Act 2004, namely that a person commits an offence if he is a person/company having control of or managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed. The rent repayment monies are to be paid as to 50% each being £2180.08 by the first and second respondents to the applicant within 28 days of the date of this decision.

Name: Judge Professor Robert Abbey Date: 09 November 2020

Annex

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

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.

(2) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3)A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine .

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the

person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are—

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

s41 Housing and Planning Act 2016

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.

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