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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AE/HMK/2020/0011** **CVP Remote**
Property	:	**182 Purves Road, London NW10 5TG**
Applicants	:	**Chandan Sethi**
Representative	:	**Flat Justice Community Interest Company**
Respondent	:	**Jaiyeola Oluyinka Odusina**
Representative	:	**In 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** **Ms S. Coughlin MCIEH; Professional Member**
Venue and date of hearing	:	**Video hearing on 23 January 2021**
Date of decision	:	**26 January 2021**

DECISION

Decision of the tribunal

(1) The tribunal finds that a rent repayment order be made in the sum of £7950 in favour of the applicant, the Tribunal being satisfied beyond reasonable doubt that the respondent has 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 in multiple occupation 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.

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 **182 Purves Road, London NW10 5TG**. This property is a five-bedroom house in the London Borough of Brent let to multiple occupants on separate tenancy agreements.

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 22 January 2021. All parties appeared being the applicant, with representation as more particularly described above and the respondent in person

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 CVP 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.

6. On 5 July 2017, the parties entered into a tenancy agreement in respect of the ground floor rear room of the Property. The tenancy agreement provided for a rent of £650 per calendar month and for the tenancy to commence on 1 August 2017. By way of variation of the tenancy agreement, rent was paid at a rent of £700 per calendar month for the period January 2020 until March 2020 The respondent is the owner of the property as listed on its registered title as the freehold proprietor

Background and the law

7. An HMO (Housing in Multiple Occupation) is a house which is occupied by a minimum of 3 people in 2 households who are sharing amenities. There are a range of different types of accommodation that could be an HMO, depending on how many people are living there and what the living arrangements are. As a general rule, where there are three or more tenants in a property who make up more than one household with shared toilet, bathroom or kitchen facilities, this could be an HMO. An HMO where there are at least 5 tenants forming more than one household sharing the facilities mentioned above must have a mandatory HMO licence.

8. 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.

9. 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 7 April 2020. 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.

10. The total value of the application is £7950 for the period 1/04/2019 to 31/03/2020: 9 months at £650 plus 3 months at £700 thereby totalling £7950.The applicant also supplied to the Tribunal proof of payment shown in the trial bundle. The Tribunal were satisfied that these payments had indeed be made.

11. The respondent, in his statement within the trial bundle admitted that the property should have had an HMO license but none had been obtained. He wrote "*I have been managing the property as a HMO since 2006. I confirm that the property is a licensable HMO under the Governments and Brent Councils Mandatory scheme. This has been confirmed and verified by the Councils own online service*."

Accordingly, the Tribunal accepted this as the respondent's acknowledgement that there had been a breach in this case there being no licence for a licensable HMO. During the period from April 2019 until March 2020, the property was occupied by five persons, except for the months of April and May 2019, when there was a temporary void and it was occupied by four persons. The property was clearly being used as a five-person HMO and so should have been licensed as such under the mandatory licensing scheme throughout the period relevant for the application. Since a property with only 4 people would have been licensable under Brent's additional licensing scheme the respondent would still have been committing an offence in this brief period.

12. Under the national mandatory licensing scheme, a property is licensable if it is occupied by five or more persons living in two or more separate households. By way of designation made on 22 April 2014, Brent Council brought in an additional licensing scheme, coming into force on 1 January 2015 and this applied to the entire Borough. It required all rented houses within the Borough consisting of three or more unrelated individuals not forming a single household to be licensed as an HMO. This scheme 1 ceased on 31 December 2019. A new additional licensing scheme came into force on 1 February 2020 and imposes the same licensing requirements as its predecessor.

The Offence

13. 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 respondent has therefore committed an offence under section 72 (1) of the Housing Act 2004 (as amended by the Housing and Planning Act 2016) as the respondent was in control of an unlicensed property and the respondent was a person managing an unlicensed property.

14. 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. There were no submissions or other evidence of a reasonable excuse for not having applied for a licence. Although the Respondent had started to apply for a license shortly after the requirement was brought in in 2015 he did not complete that application and he accepted that this did not amount to an excuse. Accordingly, the tribunal had no alternative other than to find that the respondent was guilty of the criminal offence contrary to the Housing Act 2004.

The tribunal's determination

15. The amount of the rent repayment order was extracted from the amount of rent paid by the applicants during the period of occupancy as set out within the trial bundle where the rent actually paid was stated to be £7950. This represents the maximum sum, (£100%), that might form the amount of a rent repayment order.

16. 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. As was stated in paragraph 26 of *Parker* "*Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.*"

17. 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. Express matter (c) was not considered as no such convictions apply so far as this respondent is concerned.

18. 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.

19. 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 of this kind. The conduct of the respondents did not seem to justify this allowance.

20. However, quantum of any award is not related to the profit of the Respondent, following *Vadamalayan*. The only expense deductions that may be allowed, at the discretion of the Tribunal, are for utilities paid on behalf of the tenants by the landlord. It has been argued that council tax is a fixed cost of the landlord, also payable when the property is empty. as it is not "consumed at a rate the tenant chooses" (*Vadamalayan*, §16), as per utilities and should not be an allowable expense. The Tribunal agrees with this assessment of the relevance of this outgoing. The Respondent claimed to have incurred costs of £166 per month per occupier which included utilities, council tax, broadband, insurance and service contracts, however he was not prepared to submit detailed evidence of outgoings and consequently the Tribunal found itself unable to make any deduction whatsoever in this regard.

21. The Tribunal then turned to the matter of the conduct of the parties. The landlord should have licenced this property but did not. This is a significant factor particularly when the respondent confirmed to the Tribunal that he had worked as a Housing Management professional. It remains the case that this property should have been licenced and bearing in mind the respondent's vocation the respondent should have known and in fact admitted that he did know what is required by law of a landlord of an HMO.

22. In terms of the conduct of the respondent, it was apparent to the Tribunal that he first became aware of the licensing requirement in 2015. His failure to apply for a licence for 5 years shows a neglect for HMO licensing requirements. The respondent also accepted that he failed to provide the government's edition of the 'How to Rent' Guide on the commencement of the tenancy, in contravention of reg. 3 of the Assured Shorthold Tenancy Notice and Prescribed Requirements (England) Regulations 2015. There has also been considerable disagreement between the parties about the refund of the rental deposit and this is now the subject of county court proceedings. Other allegations were made but there were none that the Tribunal felt had

been substantiated enough for them to be taken into account by the Tribunal.

23. As to the financial circumstances of the respondent, he failed to provide sufficient or indeed any written evidence or information about his financial circumstances for the Tribunal to be justified in making a deduction from the rent repayment award. Therefore, no deduction has been made.

24. 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 £7950 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.

25. Consequently, the Tribunal concluded that a rent repayment order be made in the sum of £7950 the tribunal being satisfied beyond reasonable doubt that the respondent had committed an offence pursuant to s.72 of the Housing Act 2004, namely that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under Part two of the 2004 Act but is not so licensed.

26. Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 No 1169 (L.8) does allow for the refund of Tribunal fees. Rule 13(2) states that: -

> "*The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor*."

27. There is no requirement of unreasonableness in this regard. Therefore, in this case the Tribunal considers it appropriate and proportionate in the light of the determinations set out above that the respondent refund the Applicant's Tribunal fee payments of £300.

28. In the circumstances the tribunal determines that there be an order for the refund of the application fee in the sum of £300 pursuant to Rule 13(2).

Name:	Judge Professor Robert Abbey	Date:	26 January 2021

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.