



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

--

Case reference : **LON/00BB/HMF/2020/0146
CVP Remote**

Property : **5 Elkington Road London E13 8LW**

Applicants : **Emmanuella Hagan and Titiola
Fawehinmi**

Representative : **Helen Babalola**

Respondent : **Sultan Ahmed Chowdhury**

Representative : **Mr Musleh Uddin; Solicitor**

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 M. Cairns MCIEH; Professional
Member**

**Venue and date of
hearing** : **Video hearing on 08 March 2021**

Date of decision : **11 March 2021**

DECISION

Decision of the tribunal

- (1) The Tribunal finds that a rent repayment order be made in the sum of £2713.69 in favour of the applicants, the Tribunal being satisfied beyond reasonable doubt that the respondent has committed an offence pursuant to s.95(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 three 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 **5 Elkington Road London E13 8LW**. This property is a four-bedroom Victorian end of terrace property in the London Borough of Newham let to multiple occupants (three) on a single tenancy agreement.
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 Monday 8 March 2021. The applicant appeared with representation as more particularly described above. The respondent also appeared represented by his Solicitor Mr Uddin.
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 CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP 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 Trial Bundle consisted of two submissions, one from each party, 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.
6. The applicants are the former occupants of the property. The property is described as a four-bedroom property with a living room on the ground floor converted into a fourth bedroom. On 16 August 2019 the applicants signed an assured shorthold tenancy agreement commencing on the 14 August 2019. The landlord was shown as the respondent. The letting agreement was for a period of twelve months at £1685.67 per month. The

applicants have now vacated the property. The respondent is the owner of the property as listed on its registered title

Background and the law

7. 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 three of the Act and in that regard section 95 of the 2004 Act states: -

95 Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

8. Every property to which Part 3 of the Act applies must be licensed (s.85(1) Housing Act 2004). As stated at s.85 (1) of the 2004 Act:

“(1) Every Part 3 house must be licensed under this Part unless—

(a) it is an HMO to which Part 2 applies (see section 55(2)), or

(b) a temporary exemption notice is in force in relation to it under section 86, or

(c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.”

9. The meaning of a “person having control” and “person managing” is provided by s.263 of the Housing Act 2004. “Person managing” is defined at subsection (3) as:

“[...] the person who, being an owner or lessee of the premises — receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of an HMO, persons who are in occupation as tenants or licensee of parts of the premises;

(ii) in the case of a house to which Part 3 applies (see section 79(2)),

persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises;

would so receive those rents or other payments but for having entered into an arrangement [...] with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments.”

10. 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 13 August 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.
11. The total value of the application is £2713.69. The period of the claim is from the start of the tenancy until 2 October 2019 being the date that Newham Council confirm that the licence application was received by them. Therefore, the value is calculated by considering seven weeks for that period at the rent at £1685.67 each month giving the total claimed. 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.

The Offence

12. It was noted that the local authority confirmed by email that no license in respect of the property had been applied for at the start of the tenancy or until 2 October 2019. The Newham Housing Licensing Officer wrote by email to the applicant on 9 October 2020 “...*they did not submit their application until 2nd October.*”
13. The respondent during the hearing conceded that the property should have been licensed but was not licensed. The Property was indeed required to be licensed under the Selective Licensing Scheme as per s.95(1) of the Housing Act 2004. The respondent says that he instructed his managing agents to make the license application and did so in early July 2019 before the tenancy commenced.
14. The respondents case is that “*The established facts of the case here are that I was completely transparent with Newham Council in making my application for a Selective Licence and commenced this application on*

15 July. As is clearly shown in Exhibit 1 (Enquiry Reference ENQ3267391), (a screenshot under the 'My Enquiries' page on my online account with Newham Council which shows what applications I have made to Newham Council for various services), I instructed Hunter & Bloomfield to begin the process on 15 July 2019 (which they did) and very importantly as the screenshot shows I also set a 'Target Date' of 25 July 2019 to get this finalised (well before the tenancy agreement began). As such, it is clear that every effort was, in good faith, made on my part to ensure compliance with the law and I was relying on the expertise of Hunter & Bloomfield to ensure all technicalities in this regard were complied with." In other words, the respondent seeks to rely upon the failures of his agent to provide him with reasonable excuse.

15. The applicants produced to the Tribunal a copy of the Newham property licence register as it related to the property. Under the heading "Important Dates", the 2 March 2019 was listed as being the date that the application was received and not a date in July. It seems that the application was started on 15 July but then not progressed or processed and so was not properly made until 2 October 2019. This was conceded by the respondent who blamed a "clerical error" made by the managing agents.
16. 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 three of the Act but is not so licensed. The respondent has therefore committed an offence under section 95 (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. 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.
17. In the Upper Tribunal Judge Elizabeth Cooke found that where the alleged offence is controlling or managing an unlicensed HMO, a rent repayment order 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. The order does not need to be made against the 'immediate landlord' of the tenants of the property. Rather, it can be made against any person who is "a landlord of the property where the tenant lived" (*Goldsbrough v CA Property Management Ltd* [2019] UKUT 311 (LC) at [32]-[33]).
18. 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.

19. There were submissions by the respondent of a reasonable excuse for not having applied for a licence, namely that he had in good time instructed the agents to make the application but they had as a consequence of a clerical error not made the application before the commencement of the tenancy. Indeed, the respondent says that as soon as he became aware of the error the application was made immediately thereafter to ensure a proper licence was in place. The Tribunal took the view that the failure of the agents was not a reasonable excuse. Ultimately it is the landlord's responsibility to make sure that there was a licence in place. If the agents failed to do their job properly then it may be that the respondent can seek redress from the agents but that is not for this Tribunal to consider. The respondent should have made sure that his instructions were carried out and that a licence had indeed been properly applied for and any licence fee paid. This Tribunal has to decide if there was a need for a licence and in this case there clearly was and yet none was in place for the seven weeks under consideration 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

20. The amount of the rent repayment order was extracted from the amount of rent paid by the applicant during the seven-week period of occupancy as set out within the trial bundle where the rent actually paid was stated to be £2713.69. This represents the maximum sum, (£100%), that might form the amount of a rent repayment order.
21. 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 respondent was a professional landlord as it had confirmation from the respondent in his evidence that in total he owned three such properties.. 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.”

22. 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 the respondent is concerned.

23. 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.

24. 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.
25. 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 in relation to the matter of conduct. It remains the case that this property should have been properly licenced and regrettably it was not.
26. The applicants also asserted that there had been problems with a roofing defect that gave rise to water ingress into the property. The applicants said that there were considerable delays in getting this fixed. There were also issues regarding mould and damp in one of the ground floor rooms.

The respondent accepted that there were roofing and mould problems but that he had tried to fix these but blamed the agents for some element of the delay as well as the pandemic and difficulties getting a suitable roofer to effect repairs.

The Tribunal accepts that an assessment of the above negative aspects of the conduct of the respondent should be taken into account when considering the amount or level of the rent repayment order necessary in this case. Tenants are entitled to live in premises that are not affected by water ingress or mould and to allow these problems to continue for several weeks is unacceptable conduct on the part of the landlord.

27. 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 £2713.69 giving a final figure of 100% of the claim. This figure represents the Tribunal's overall view of the circumstances that determined the amount of the rent repayment order.
28. Consequently, the Tribunal concluded that a rent repayment order be made in the sum of £2713.69 the tribunal being satisfied beyond reasonable doubt that the respondent had committed an offence pursuant to s.95 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 three of the 2004 Act but is not so licensed.

Name: Judge Professor Robert Abbey Date: 11 March 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

95 Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2) 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 90(6), and

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

(3) 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 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) 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 failing to comply with the condition, as the case may be.

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

(6) A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(6B) 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

(7) For the purposes of subsection (3) 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 (8) is met.

(8) 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.

(9) In subsection (8) “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.