FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BJ/HMF/2020/0093**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**58 Selkirk Road, London, SW17 0ES**
Applicant	**:**	**Jacob Jewitt-Jalland**
Representative	**:**	**In person**
Respondent	**:**	**Nest Estates Limited**
Representative	**:**	**No appearance**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Antony Parkinson MRICS**
Date and Venue of Hearing	**:**	**16 March 2021** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**19 March 2021**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicant provided a Bundle of Documents which extended to 59 pages.

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the Respondent in the sum of £3,125 which is to be paid by 16 April 2021.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 16 April 2021 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. By an application, dated 24 June 2020, the Applicant seeks a Rent Repayment Order ("RRO") against the Respondent pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The Respondent was his immediate landlord of Room 4, 58 Selkirk Road, London, SW17 0ES ("the Room").

2. On 16 November 2020, the Tribunal gave Directions. Pursuant to the Directions, the Applicant has filed a Bundle of Documents.

3. By 25 January 2021, the Respondent was directed to file a Bundle of Documents upon which it relied in opposing the application. The Respondent has not filed a bundle.

4. On 15 March 2021, Rizwan Alam, the director of the Respondent company, applied for today's hearing to be made a paper determination as the company was unable to afford to pay for legal representation. A Procedural Judge considered the letter and directed the Respondent to attend the hearing. The Judge noted that the Respondent did not require legal representation.

The Hearing

5. The Applicant, Mr Jacob Jewitt-Jalland, appeared in person. He had been working as a travel designer for a luxury travel firm. As a result of Covid-19, the firm has gone into liquidation. He is now working as a delivery driver for Ocado. He gave evidence which we accept without hesitation.

6. The Applicant also served witness statements from his fellow tenants, Amit Katri, Chiara Chiessi, Marzena Piersa and Nsobani Babirye. None of the tenants were available to give evidence. On 9 November 2000, a Tribunal made a RRO in favour of Ms Piersa in the sum of £4,360.16 against both the Respondent and the superior landlord, Mr Jan Ahmad, in respect of a similar offence of control or management of an unlicenced HMO. Chiara Chiessi and Nsobani Babirye have also made applications to the tribunal for RROs.

7. Shortly before the hearing, the Respondent contacted the case officer and requested that the hearing be adjourned. The Tribunal notified Mr Alam that the hearing would proceed regardless of whether he decided to attend. He did not attend. We are satisfied that he had made an informed decision not to engage with these proceedings. We note that in the application brought by Ms Piersa in respect of Room 2, he had been represented by Counsel.

The Housing and Planning Act 2016 ("the 2016 Act")

8. Section 40 of the 2016 Act provides:

> "(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
>
> (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
>
> (a) repay an amount of rent paid by a tenant, or
>
> (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

9. Section 40(3) a list of seven offences. This includes an offence under section 72(1) of the 2004 Act of "control or management of an unlicenced HMO".

10. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

11. Section 43 provides for the making of RROs:

> "(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 has been convicted)."

12. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

> "(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.

13. Section 44(4) provides (emphasis added):

> "(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."

14. Section 56 is the definition section. This provides that "tenancy" includes a licence.

The Housing Act 2004 ("the 2004 Act")

15. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that 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."

16. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households; and (c) meets the standard test under section 254(2) of the 2004 Act.

17. A licence under Part of the 2004 Act may be held by a person who is not the immediate landlord of the occupier of residential premises. Section 64 lays down no ownership condition for the grant of a licence. The local housing authority ("LHA") must be satisfied that an applicant is a fit and proper person to be the licence holder, and that, out of all the persons reasonably available to be the licence holder in respect of the house, they are the most appropriate person.

18. The expression "person having control" is defined in section 263(1) of the 2004 Act. It is relevant to this application in a number of different respects. It is used to identify the most appropriate person to hold a licence. Where a licence has been granted, the licence holder will be the person on whom any improvement notice will be served, and who may therefore commit the offence under section 30(1). It is also used to identify one of the two categories of persons who may commit the offences under section 72(1) of "having control" or "management" of an unlicensed HMO or house.

19. Section 263 defines the concepts of "person having control" and "person managing":

"(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account

or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(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; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) 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;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

20. Section 263 was recently considered by Martin Rodger QC, the Deputy President, in *Rakusen v Jepson and Others [2020] UKUT 298* (LC) ("R*akusen*"). The situation is complex given the range of people, apart from the immediate landlord, who may be deemed to be persons "having control" and/or "managing" premises. The Deputy President was satisfied that a tenant could seek a RRO against both their immediate landlord or a superior landlord.

The Background

21. In January 2019, the Applicant had an urgent need for accommodation as he had just split up with his girlfriend. He found the accommodation through the "spare room" website. At the time, he was working as a travel designer for a luxury travel firm.

22. The Applicant signed a licence agreement, dated 21 January 2019, in respect of Room 4. The licensor was specified as "Nest Estates Limited". The rent was £625 per month. He was also required to pay a deposit of £721. The term was for a period of 5 months beginning on 25 January 2019. He was provided with a key to his room.

23. We are satisfied that the Applicant was granted exclusive occupation of Room 4 for a term at a rent. The substance and reality of the agreement was to create a tenancy (see *Street v Mountford* [1985] AC 818). The licence agreement was a sham intended to conceal the true nature of the relationship of landlord and tenant.

24. The Applicant was also required to pay an administration fee of £150. No explanation was given as to why this administration fee was required. In retrospect, he has seen it as a means whereby the landlord could extract additional money from him. On 25 January 2019, the Applicant moved into occupation.

25. 58 Selkirk Road is a two storey end of terrace house. On the ground floor, there is a bedroom (formerly living room), kitchen and bathroom; on the first floor, four bedrooms and a shower room. Throughout his period of occupation, there were five people occupying each of the bedrooms: Room 1: Amit Kumar; Room 2: Marzena Piersa; Room 3: Nsobani Zereth; Room 4: the Applicant and Room 5: Chiara Chiessi. Since 1 October 2018, the property has required a HMO licence (see [16] above).

26. The Applicant did not renew his tenancy. He paid his rent up to 24 June. His deposit was not returned to him. He stated that he had little to do with his landlord. There was one occasion when he reported that the door handle to the bathroom was broken. He received no response from the landlord and the disrepair was not remedied. The Applicant stated that other tenants had faced similar problems.

Our Determination

27. Our starting point is section 263 of the 2004 Act (see [19] above). We are satisfied that the Respondent falls within the statutory definitions of:

(i) the "person having control" of the property: The Respondent received the "rack-rent" for the Property. The superior landlord, Mr Jan Ahmad, would also have fallen within this definition. However, the Applicant has decided not to seek a RRO against him.

(ii) the "person managing" the property: The Respondent received the rent from the persons who were in occupation of the property.

28. The Tribunal is satisfied beyond reasonable doubt that the Respondent committed an offence under section 72(1) of the 2004 Act. We are satisfied that:

(i) The Property was an HMO falling within the "standard test" as defined by section 254(2) of the 2004 Act which required a licence (see [15] above):

(a) it consisted of five units of living accommodation not consisting of self-contained flats;

(b) the living accommodation was occupied by persons who did not form a single household;

(c) the living accommodation was occupied by the tenants as their only or main residence;

(d) their occupation of the living accommodation constituted the only use of the accommodation;

(e) rents were payable in respect of the living accommodation; and

(f) the households who occupied the living accommodation shared the kitchen, bathrooms and toilets.

(ii) The Property fell within the prescribed description of an HMO that required a licence (see [19] above):

(a) it was occupied by five or more persons;

(b) it was occupied by persons living in two or more separate households; and

(c) it met the standard test under section 254(2) of the 2004 Act.

(iii) The Respondent had not licenced the HMO as required by section 61(2) of the 2004 Act. This is an offence under section 72(1).

(iv) The offence was committed over the period of 25 January to 24 June 2019. It continued after the Applicant had vacated his room.

29. The Tribunal needed to be satisfied that "the offence was committed in the period of 12 months ending with the day on which the application is made". The Applicant's tenancy terminated on 24 June 2019; he made his application to the tribunal on 24 June 2020. The leading authority on the computation of time is *Dodds v Walker* [1981] 1 WLR 1027 which applied section 29 (3) of the Landlord and Tenant Act 1954 which provides that no application for a new tenancy under section 24 (1) "shall be entertained unless it is made not .... more than four months after the giving of the landlord's notice under section 25 of this Act." Applying this decision, the period of 12 months for bringing this application started to run at midnight 24/25 June 2019 and ended at midnight on 24/25 June 2020. The application, was thus brought on the last permissible day.

30. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal

credit. We are satisfied that the Applicant was not in receipt of any state benefits. He paid his rent from his earnings.

31. The Applicant seeks a RRO in the sum of £3,125 which was the rent which he paid over the five month period of his tenancy. We cannot make a RRO in respect of either the administrative charge (£150) or the deposit (£721). The Applicant took us through his bank statements for the relevant period. We are satisfied that this rent was paid.

32. Section 44 of the 2016 Act, requires the Tribunal to take the following matters into account:

(i) The conduct of the landlord.

(ii) The conduct of the tenant. There has been no criticism of the Applicant's conduct.

(iii) The financial circumstances of the landlord. We have received no evidence on this.

(iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.

33. Having regard to these factors and our findings above, we have no hesitation in making a RRO in the sum sought. We are satisfied that the licence agreement was an artificial transaction to conceal the relationship of landlord and tenant. We can see no justification for the administration charge. The deposit should have been placed in rent deposit scheme and returned to the Applicant at the end of his tenancy. The landlord seems to have ignored the tenants' complaints of disrepair.

34. We have regard to the fact that the Respondent has paid a Financial Penalty of £4,000 which was imposed by the London Borough of Wandsworth in respect of an offence of control or management of an unlicenced HMO contrary to section 72(1) of the 2004 Act. This was at the lower end of the scale We see no reason to deduct this from the RRO (see *Vadamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38, per Judge Cooke at [55]).

35. We are also satisfied that the Respondent should refund to the Applicant the tribunal fees of £300 which he has paid in connection with this application.

36. Mr Jewitt-Jalland asked us to record his appreciation for the assistance provided by the case officer, Nichola Stewart. This is a complex area of the law and the tribunal's case officers play an important role in ensuring that

unrepresented parties, whether applicants or respondents, are able to secure access to justice.

Judge Robert Latham
19 March 2021

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.