



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

Case Reference : **LON/00AP/HMF/2021/0120**

**HMCTS code
(paper, video,
audio)** : **V - Video**

Property : **111, Rutland Gardens, Harringay, London
N4 1JW**

Applicant : **Mr. Ben Mitchell**

Representative : **Not represented**

Respondent : **Mr. Charles Miller**

Representative : **Not represented**

Type of Application : **Application for a rent repayment order by
tenant**

Tribunal : **Tribunal Judge S.J. Walker
Tribunal Member F. Macleod MCIEH.**

**Date and Venue of
Hearing** : **2 November 2021 - video hearing**

Date of Decision : **2 November 2021**

DECISION

- (1) The Tribunal refuses the application for a Rent Repayment Order under section 43 of the Housing and Planning Act 2016.**
- (2) The Tribunal makes no order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbusement of fees.**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are set out below, the contents of which were noted. The Tribunal's determination is set out below.

Reasons

The Application

1. The Applicant seeks a rent repayment order pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act").

The Law

2. The relevant legal provisions are set out in the Appendix to this decision.
3. The Tribunal may make a rent repayment order when a landlord has committed one or more of a number of offences listed in section 40(3) of the Act. An offence is committed under section 72(1) of the 2004 Act if a person has control or management of an HMO which is required to be licensed but is not. By section 61(1) of the 2004 Act every HMO to which Part 2 of that Act applies must be licensed save in prescribed circumstances which do not apply in this case.
4. Section 55 of the 2004 Act explains which HMOs are subject to the terms of Part 2 of that Act. An HMO falls within the scope of Part 2 if it is of a prescribed description. Those prescribed descriptions are to be found in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 ("the Order"). Under the Order an HMO falls within the prescribed description if it is occupied by five or more people, and is occupied by people living in two or more single households, and, among other things, it meets the standard test under section 254(2) of the 2004 Act.
5. A building meets the standard test if it;
 - (a) *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 ...;*
 - (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;*
 - (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 the 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.”*
6. By virtue of section 258 of the 2004 Act persons are to be regarded as not forming a single household unless they are all members of the same family. To be members of the same family they must be related, a couple, or related to the other member of a couple.
 7. By section 55(2)(a) of the 2004 Act licences may also be required in respect of HMOs which are defined in a designation made by a local authority under its powers contained in section 56 of the 2004 Act to introduce additional licensing in its area. In such cases a property may be an HMO even if it has fewer than 5 occupants.
 8. An order may only be made under section 43 of the Act if the Tribunal is satisfied beyond reasonable doubt that an offence has been committed. This is the criminal standard of proof and is a high hurdle to overcome, though it does not require proof beyond any doubt at all.
 9. The Act makes provision about when applications may be made and in respect of what periods orders may be made. Those provisions are crucial in this case.
 10. Section 44(2) of the Act provides that for offences of the kind alleged in this case an order may be made in respect of a period not exceeding 12 months during which the landlord was committing the offence.
 11. Section 41(2) of the Act states as follows;
“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 Hearing

12. The Applicant and the Respondent both attended the hearing. Neither of them were represented.
13. The Tribunal had before it two bundles of documents. The first was prepared by the Applicant. It was un-numbered but consisted of 32 pages. The second was a numbered bundle of 95 pages from the Respondent. There was also before the Tribunal some written comments from the Applicant in respect of the Respondent’s witness and a schedule of HMO licences in force in the London Borough of Haringey dated 14 February 2019.

The Issues

14. At the beginning of the hearing the Tribunal noted that the Applicant's application did not state the period in respect of which an order was sought. It also drew to the Applicant's attention the fact that his application appeared to have been made in May 2021.
15. The Applicant said that he had in fact made an earlier application in March 2020 by post at the beginning of the Covid pandemic. The Tribunal asked its clerk to do a thorough search of the Tribunal's records to establish whether such an application had been received. It was informed that the only application of which there was any record was the one which appeared in the Applicant's bundle and which was signed by him in May 2021. The clerk informed the Tribunal that this application was received on 4 May 2021. On that basis the Tribunal was satisfied that this was the only application before it and that it was made on 4 May 2021.
16. The Tribunal then invited the Applicant to identify the period in respect of which an order was sought. He initially stated that he sought an order for the period from March 2019 to March 2020. The Tribunal then invited the Applicant to consider carefully the notes on the first page of the application and the notes in the annex attached to the Tribunal's directions dated 5 July 2021. He then realised that his application would be out of time and stated that he sought an order for the period of 12 months from May 2019 to May 2020. The Tribunal took this to mean the period of 12 months ending on the date of his application, thereby, on the face of it, bringing his application within time.
17. The Tribunal also sought to clarify the offence which was being alleged. The Applicant stated that it was his case that there were 5 people living at the property during the period in question. This suggested an allegation of an offence under section 72(1) of the 2004 Act in respect of an HMO falling within the terms of the Order set out above rather than one arising out of additional licensing.
18. Although the Applicant had not provided a witness statement setting out how many people were living at the property or when, the Tribunal invited him to give oral evidence of this. His evidence was that at the beginning of May 2019 there were 5 people living in the property, himself, a man called Mike, Kevin Tuloo (the Respondent's witness), a woman called Julie and a man called Adam. He said that in March 2020 Kevin Tuloo left – Mr. Tuloo's own evidence contained in his witness statement at page 87 of the Respondent's bundle was that he rented a room at the property until 29 March 2020.
19. The Applicant's evidence was that after Mr. Tuloo left the property Mike also left, though he was replaced, and Julie left too. His clear evidence was that from March 2020 until the end of the period in question there were no more than 4 people living at the property.

20. Although there was a letter in the Respondent's bundle (at page 11) which suggested that the London Borough of Haringey had introduced an additional licensing scheme which required properties with 3 or more unrelated occupants to be licensed, the Respondent's evidence was that this letter was received in October 2020. The Applicant provided no evidence to the Tribunal to show that the local authority had ever adopted an additional licensing scheme, and there was certainly no evidence to show that such a scheme was in operation at any time in the period of 12 months prior to 4 May 2020.

Conclusions

21. It follows from the evidence set out above that the Tribunal could not be satisfied that the property was an HMO which required licensing in the period from 29 March 2020 until 4 May 2020. On the Applicant's own evidence the property did not fall within the terms of the Order from the end of March 2020 onwards. There was insufficient evidence before the Tribunal to enable it to be satisfied that there was an additional licensing scheme in force which would apply to properties with 4 occupants at any time during the period in question. It further follows, therefore, that the Tribunal could not be satisfied that an offence was being committed in that period.
22. Although the evidence provided by the Applicant suggested that an offence was being committed up until 29 March 2020, that was more than 12 months before the Applicant made his application and so, by virtue of section 41(2)(b) of the Act his application was out of time. The Applicant has failed to satisfy the Tribunal that during the period specified in his application an offence was being committed which also fell within the period of 12 months ending with the day on which he made that application.
23. The Tribunal therefore concluded that the Applicant's application must be refused on the basis that it was made out of time.
24. There was no application by the Applicant under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imburement of the fees paid for bringing the Application. The Tribunal concluded that, in any event, given its decision, it was not just and equitable to make such an order.

Name: Tribunal Judge S.J.
Walker

Date: 2 November 2021

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Housing Act 2004

Section 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.
- (1) 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.
- (2) 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.
- (3) 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).

263 Meaning of “person having control” and “person managing” etc.

- (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.
- (4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).
- (5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

- (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.
- (3) A reference to “*an offence to which this Chapter applies*” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

Act	section	general description of offence
1 Criminal Law Act 1977	section 6(1)	violence for securing entry
2 Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3 Housing Act 2004	section 30(1)	failure to comply with improvement notice
4	section 32(1)	failure to comply with prohibition order etc
5	section 72(1)	control or management of unlicensed HMO

6	section 95(1)	control or management of unlicensed house
7	This Act	section 21
		breach of banning order

- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if –
- the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - 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 –
- the offence relates to housing in the authority's area, and
 - 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.

Section 43 Making of rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined in accordance with –
- section 44 (where the application is made by a tenant);
 - section 45 (where the application is made by a local housing authority);
 - section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed ***the amount must relate to rent paid by the tenant in respect of***

an offence mentioned in [row 1 or 2 of the table in section 40\(3\)](#) the period of 12 months ending with the date of the offence

an offence mentioned in [row 3, 4, 5, 6 or 7 of the table in section 40\(3\)](#) a period, not exceeding 12 months, during which the landlord was committing the offence

- (3) The amount that the landlord may be required to repay in respect of a period must not exceed—
 - (a) the rent 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.

Section 52 Interpretation of Chapter

- (1) In this Chapter—
 - “offence to which this Chapter applies” has the meaning given by section 40;
 - “relevant award of universal credit” means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012;
 - “rent” includes any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit;
 - “rent repayment order” has the meaning given by section 40.
- (2) For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent.