FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00HN/HMF/2022/0016** **CHI/00HN/HMF/2022/0019**
Property	**:**	**56 Wentworth Avenue, Southbourne, Bournemouth BH5 2EG**
Applicant	**:**	**Jamie Megan Currie (CHI/00HN/HMF/2022/0016)** **Laurence James David Jardine (CHI/00HN/HMF/2022/0019)**
Representative	**:**	**none**
Respondent	**:**	**Margaret Oloo (both applications)**
Representative	**:**	**James Hunter of Gales Solicitors (not in attendance)**
Type of Application	**:**	**Applications for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge HD Lederman** **N Robinson FRICS** **P Gravell**
Date and Venue of Hearing	**:**	**17 January 2023** **Hybrid hearing partly Remote hearing by Cloud Video platform**
Date of Decision	**:**	**15th February 2023**

DECISION

Decision of the Tribunal

The Tribunal:

a. Orders the Respondent to make payment of a total amount of £221.00 to Jamie Megan Currie as a Rent Repayment Order ("RRO") under section 43 of the Housing and Planning Act 2016 ("the 2016 Act").

b. Orders the Respondent to make payment of a total amount of £221.00 to Laurence James David Jardine as a Rent Repayment Order ("RRO") under section 43 of the Housing and Planning Act 2016 ("the 2016 Act").

c. Refuses the Applicants' request in each case for reimbursement of application and hearing fees.

Reasons

1. In these reasons, references to the page numbers in Jamie Megan Currie's bundle (consisting of 39 numbered pages) are described as JC [ ]. References to the page numbers in Laurence James David Jardine's bundle (consisting of 84 numbered pages) are described as LJ [ ].

2. Where narrative, facts or descriptions are recited, they should be treated as the Tribunal's findings of fact unless stated otherwise. These reasons address in summary form the key issues raised by the application. They do not rehearse every point raised or debated. The Tribunal concentrates on those issues which go to the heart of the application.

Representation and attendance

3. Neither Applicant was represented. The Respondent's solicitor James Hunter from Gales solicitors was not in attendance but sent undated written submissions, with his apologies for non-attendance due to illness. The Respondent was accompanied by two people who attended the hearing but did not take any part. The Tribunal's professional member Ms P Gravell attended the hearing remotely through Cloud Video Platform, as did Laurence James David Jardine.

4. The Tribunal Judge ensured before and during the hearing that all parties (and in particular Laurence James David Jardine) could see and hear the other parties and that the cloud video connection was satisfactory during active parts of the hearing. All parties were offered the opportunity of a short adjournment during the hearing and before closing submissions (closing summaries).

The Application

5. In each case the Tribunal is required to determine an application received 25th July 2022 (Jamie Currie) and on 4th August 2022 (Laurence Jardine)

under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for an RRO in respect of 56 Wentworth Avenue, Southbourne, Bournemouth BH5 2EG ("the premises"). It is common ground the premises comprised a two- storey (ground and first floor) house with at least 4 bedrooms, a kitchen, living room and bathroom and a further downstairs toilet, situated in the area of Bournemouth convenient for students: see the RRO application form.

6. It was not asserted that this area of Bournemouth was the subject of an Additional Licencing scheme or selective licensing.

7. Laurence Jardine sought an RRO in the sum of £460.00 being one month's rent: see LR [5] and Jamie Currie sought an RRO for £2300.00 for rent paid at the rate of £460.00 per month for the period 06 September 2021 to 6th February 2022 JC [13].

The Hearing and the participants

8. The Tribunal checked that all parties had the same copies of the bundle and documents before the hearing started. Laurence Jardine did not have a copy of the hearing bundle submitted by Jamie Currie, but his hearing bundle contained most, if not all, of the documents in her bundle. He did not ask for an adjournment. The Tribunal Judge invited Laurence Jardine to ask for any document which he may not have seen or been referred to be drawn to his attention. The Tribunal formed the view during the hearing that Laurence Jardine was an intelligent and articulate person with post-graduate level qualifications working in the health service as a physiotherapist or similar level who was capable of drawing the Tribunal's attention to any points at which he was not following or understanding the proceedings.

9. Similarly, Jamie Curran was an articulate and intelligent person who at the time of her occupation of the premises was a student. She followed the proceedings at the Tribunal hearing carefully and was able to ask questions when she was unsure or felt that an issue needed to be raised by her. She was able to modify her request for an RRO when she appreciated the Tribunal might find that the period of an offence might have been committed was shorter than the period for which she sought an RRO. She had a good understanding of the proceedings at the hearing in the Tribunal's view.

10. The Tribunal Judge checked throughout the hearing that the Respondent understood the issues at the hearing. Although the Respondent appeared initially to be appropriately concerned and taciturn, it soon became clear that she had a good understanding and was an intelligent person as might be expected of someone who worked as a Mental Health Support Worker and on the Nursing Bank. She has also had the benefit of legal advice and submissions from Gales solicitors who it could be expected would have explained the issues to her when assisting in the preparation of her witness statement. The Tribunal Judge was satisfied all parties were able to fully participate in the hearing.

11. The Tribunal Judge indicated at the outset the following issues arose:

a. Can each Applicant satisfy the Tribunal beyond reasonable doubt (so that the Tribunal is sure) that the Respondent had committed the criminal offence of being a person having control of or managing the premises when they were a House in Multiple Occupation (an "HMO") which was required to be licensed but was not so licensed contrary to section 72(1) of the Housing Act 2004 ("the 2004 Act") for the dates alleged;
b. If any of the above were established, should the Tribunal exercise its discretion to make an RRO.
c. If so what should the amount of the RRO be (by reference to any offence or offences found to have been committed) taking into account:

(a)the conduct of the landlord and the tenant,

(b)the financial circumstances of the landlord, and

(c)whether the landlord has been convicted of an offence.

(d) the period during which any relevant offence was found to have been committed (if applicable)

Inspection

12. None of the parties contended that the Tribunal needed to inspect the premises. The Tribunal considered an inspection was not proportionate or necessary to determine the issues.

Was the offence under section 72(1) of 2004 Act committed by the Respondent?

13. The Respondent was informed at the outset that she did not need to give evidence about whether the circumstances gave rise to this offence. She was told she could confine her evidence to the issue of quantum of any RRO and simply comment upon the evidence produced by the Applicants. The Respondent chose to give evidence about all issues.

14. The relevant parts of the 2004 Act are not straightforward. They are considered below.

Licensing requirements

15. Each Applicant relied upon a letter from Shaun Moss Private Sector Enforcement Manager at Bournemouth Christchurch and Poole Council ("BCP") in identical terms to that at JC [38-39] and LJ [18-19] which asserted that an offence was committed under section 72 of the 2004 Act relating to the premises on 26th January 2022. It was explained to the parties that the task of the Tribunal was to form a view about whether an offence was committed independently of BCP and this letter would only be treated as evidence of the opinion of BCP. It was common ground that the Respondent

was not prosecuted or convicted of any offence. BCP's letter indicates she was issued with a financial penalty notice in relation to the offence of 26th January 2022.

16. The Respondent's did not appeal that notice and agreed to pay £5000.00 in respect of that notice. In her words she "acknowledged" that she "was in breach of the HMO regulations": see paragraph 28 of her statement of December 2022 at LJ [34]. The Tribunal places little weight on that apparent admission for 2 reasons. Firstly, it is apparent that the Respondent suffered a bereavement of a close family member at about that time (April 2022 according to the Respondent's solicitor's submissions) and did not have the time or energy to contest BCP's assertions: see paragraph 28 of her statement of December 2022 at LJ [34]. Secondly, it is apparent that she made that admission in the belief that "houses with at least 3 residents required HMO licensing" see paragraph 19 of her statement of December 2022 at LJ [33]. The Tribunal turns to consider its understanding of the relevant legislation.

17. Section 72(1) of the 2004 Act provides that a person who has control of or manages an HMO required to be licensed under section 61 of the 2004 Act commits an offence if it is not so licensed. Section 72(5) of the 2004 Act provides that "In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that [the person accused] 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." (Tribunal's insertions)

18. Section 61(1) of the 2004 Act provides that "Every HMO to which this Part applies must be licensed under this Part unless–

> (a) a temporary exemption notice is in force in relation to it under section 62, or
> (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4."

The relevant part of the 2004 Act is Part 2. Section 55 of the 2004 Act is entitled "Licensing of HMOs to which this Part applies". Sections 55(1) and 55(2) of the 2004 Act (in their relevant parts) provide:

> "(1) This Part provides for HMOs to be licensed by local housing authorities where–
>
> (a) they are HMOs to which this Part applies (see subsection (2)), and
> (b) they are required to be licensed under this Part (see section 61(1)).

(2) This Part applies to the following HMOs in the case of each local housing authority–

(a) any HMO in the authority's district which falls within any prescribed description of HMO, and
(b)……."

19. Article 4 of Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018/221 provides that "An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act 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—

(i) the standard test under section 254(2) of the Act;
(ii) the self-contained flat test under section 254(3) of the Act but is not a purpose-built flat situated in a block comprising three or more self-contained flats; or
(iii) the converted building test under section 254(4) of the Act."

References to "the Act" in that Order are to the 2004 Act: article 3.

20. The Tribunal turns to the definition in section 254(2) of the 2004 Act. This sets out what constitutes an HMO, falling within the "standard test":

"A building or part of a building meets the standard test if

(a) it consists of one or more units of living accommodation not consisting of self-contained flats;
(b) the living accommodation is occupied by persons who do not form a single household;
(c) the living accommodation is occupied by the tenants as their only or main residence;
(d) their occupation of the living accommodation constitutes the only use of that accommodation;
(e) rents are payable in respect of the living accommodation; and
(f) two or more of the households who occupy the living accommodation share one or more basic amenities, namely the kitchen, a bathroom and a toilet. "

21. Section 259 of the 2004 Act contains provisions explaining which persons treated as occupying premises as only or main residence for the purpose of the HMO legislation. The relevant part is section 259(2) which provides "A person is to be treated as so occupying a building or part of a building if it is occupied by the person— (a) as the person's residence for the purpose of undertaking a full-time course of further or higher education;".

22. It was common ground and very frankly accepted by the Respondent in her witness statement of 15th December 2022 (and not contradicted by her oral evidence), that the occupants of the premises apart from herself – at the relevant dates were all students – see for example paragraphs 5 and 10 at LJ [32].

23. Section 260 of the 2004 Act enacts a presumption that the occupation of living accommodation constitutes the only use of that accommodation where that issue arises in proceedings. There is no presumption (evidential or otherwise) in respect of any of the other elements of the standard test. The burden rests upon the Applicants to establish each element of the offences so the Tribunal is satisfied so that it is sure an offence was committed during the relevant dates.

Controlling or managing the premises

24. The Respondent accepted that she had overall responsibility for repairs and maintenance. It was clear she had control and management of the premises.

Did the premises amount to an HMO and if so on what dates?

25. The Tribunal examines this allegation by reference to the dates set out in the applications for an RRO. This is necessary as some of the dates given for occupation and commission of the alleged offence in the letter from BCP differ from the dates given in the application form. The application form is treated as the equivalent to a summons alleging a criminal charge. The Tribunal has not seen the financial penalty notice issued by BCP or any witness evidence from BCP apart from the letters referred to.

26. The Respondent once alerted to the need for licence applied for a Temporary Exemption Notice ("a TEN") on 1st February 2022: see BCP's letter at LJ [18] and JC [38]. BCP notified the Respondent of its decision to refuse a TEN on 25th March 2022 according to its letter. This delay provided the Respondent with a defence to the allegation of managing or controlling an unlicenced HMO under section 72(1) of the 2004 Act if (as the Tribunal finds) on the balance of probabilities she made an application for a TEN from 1st February 2022. TEN's are governed by the following provisions in the 2004 Act.

27. Section 62(1) provides: "This section applies where 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, notifies the local housing authority of his intention to take particular steps with a view to securing that the house is no longer required to be licensed."

28. Sections 62(6) and 62(7) of the 2004 Act provide:

> "62(6) If the authority decide not to serve a temporary exemption notice in response to a notification under subsection (1), they must without delay serve on the person concerned a notice informing him of—
>
> (a)the decision,

(b)the reasons for it and the date on which it was made,
(c)the right to appeal against the decision under subsection (7), and
(d)the period within which an appeal may be made under that subsection.

(7) The person concerned may appeal to [the FTT] against the decision within the period of 28 days beginning with the date specified under subsection (6) as the date on which it was made."

29. Section 72(4) of the 2004 Act provides: "In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time— a notification had been duly given in respect of the house under section 62(1),..... and that notification ..... was still effective (see subsection (8))."

30. Section 72(8) of the 2004 Act provides "For the purposes of subsection (4) a notification ..... 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....."

31. Accordingly, the date of commission of any offence committed by the Respondent under section 72(1) of the 2004 Act, ended on 1st February 2022 as the application for a TEN was made on that date and not determined until several weeks later after both Applicants had left the premises.

Persons in occupation of the premises at the relevant times

32. The Tribunal turns to consider the evidence about this. The witness statements and other evidence produced by the Applicants did not clearly identify who was in occupation of the premises at the relevant dates. Some of the Tribunal's findings about this arose from questions asked at the hearing.

33. Jamie Currie accepted that until Laurence Jardine began to occupy the premises there were only 4 individuals in occupation – including the Respondent. She agreed that the date when Laurence Jardine commenced occupation was 7th January 2022. She had been in occupation since September 2021 – see her written agreement at JC [29]. Laurence Jardine accepted that he left on 4th February 2022. He left before his agreement expired owing to his unhappiness with the arrangements. After he left Jamie Currie accepted there were only 4 or 3 people sharing occupation.

34. Both Jamie Currie and Laurence Jardine were uncertain about the precise date when Laurence Jardine left the premises but his transcript of text messages at page LJ [81] clearly suggests 4th February 2022 was the date when he was "packing his bags".

35. Neither of the Applicants had a good memory of the identities of the other individuals who were occupying the premises during the relevant periods

although they did offer names such as Mohamed and Hamed - see Laurence Jardine's statement at page LJ [72] which gives first names and contact numbers only. Although Laurence Jardine gave evidence that the others were students, his recollection about this was limited in detail.

36. It is possible that 5 individuals (including the Respondent) were occupying the premises as their main or only residence for the purposes of the provisions of the 2004 Act for a period greater than 7th January 2022 to 4th February 2022. However, the Applicants have not satisfied the Tribunal so that they are sure that the relevant occupation of 5 individuals extended beyond 4th February 2022. In particular Laurence Jardine who would have been in possession of contemporary records of the date when he left, was far from clear or certain about the date.

37. The Respondent did not seek to argue that she had a "reasonable excuse" defence to the allegation of committing the offence of controlling or managing an unlicensed HMO under section 72 of the 2004 Act.

38. The Tribunal concludes the offence under section 72 of the 2004 Act was committed between 7th January 2022 and 1st February 2022 (when the TEN was submitted) - 24 days as an HMO licence was required during that period.

Discretion to make an RRO

39. It is clear that in most case where a relevant housing offence has been found to have been committed by a landlord an RRO will be made. there is very limited scope for exercise of discretion not to make an order: *LB Newham v Harris* [2017] UKUT 0264 under the parallel provisions of section 97 of the 2004 Act.

The amount of the RRO

Conduct of the Respondent as landlord

40. The Tribunal finds the circumstances in which the offence was committed were at the very lowest end of the scale of seriousness. Shortly after the need for licence was pointed out to the Respondent, she took steps to rectify the omission and applied for a TEN on 1st February 2022. The Tribunal accepts her evidence that had she been aware of the need to apply for a licence before that date she would have done so.

41. There is no evidence of previous convictions, cautions or previous misconduct by the Respondent.

42. The Tribunal is required to leave out of account the fact that the Respondent has had to pay a financial penalty: see Upper Tribunal authority such as *Acheampong v Roman* [2022] HLR 855.

43. Additionally, the *Acheampong* decision requires the Tribunal to leave out of account (and not deduct) any expenditure of the Respondent landlord

on the premises, except for the cost of utilities supplied to the lessees paid for by her. The Tribunal had unchallenged evidence from the Respondent in paragraph 34 of her statement of December 2022 at JC [23] that that approximately £250 per month was expended by her on gas and electricity. Very roughly, water/sewerage charges could be estimated at £54.72 per month. Those sums need to be apportioned to the 5 individuals occupying the premises amounting to approximately £60.00 per month expended by the Respondent on each lessee. This produces a figure of £400.00 per month as a starting point for each Applicant (deducting £60 per month from the monthly rent of £460.00 per month): see the *Acheampong* decision.

44. The *Acheampong* decision requires the Tribunal to consider the seriousness of the Respondent's conduct in the context of the factors in section 44(4) of the 2016 Act (which include the financial circumstances of the landlord and the tenants).

45. Each of the Applicants raised concerns about the Respondent's conduct as landlord which they argued were relevant. The Tribunal has carefully considered the detail of these concerns. It should not be assumed that the Tribunal has minimised or ignored those concerns by summarising them below:

    a. Laurence Jardine was unable to view the property before he commenced occupation because of travel restrictions imposed during the Covid 19 pandemic while he was abroad; he regarded himself as in need of accommodation to pursue his Master's course in Bournemouth;

    b. Laurence Jardine interpreted the Respondent's request for payment of one month's rent in advance and a one month's deposit before he entered occupation as a request for an additional month's rent more than agreed: see his statement on page LJ [71]. He also read that request as a threat of eviction. The transcript of text messages at page LJ [79-80] appears to show that the issue of asking him to find alternative accommodation may have occurred as the one month's rent and deposit was delayed in reaching the Respondent's bank account and complaint has been made to the Council about the state of repair (Laurence Jardine's mother's letter to the Council is at LJ [74-75]).

    c. Laurence Jardine contends that his deposit should have been the subject of protection (this probably does not arise as the Respondent was a resident landlord);

    d. Jamie Currie's statement at page [37] complains of being told off on "numerous times" for things that were not "her fault" such as leaving the cooker untidy or placing inappropriate items in the recycling bin. She also was concerned about a "post it" note being placed on gas hob by the Respondent which she regarded as a fire safety hazard.

e. Jamie Currie's statement at page [37] referred to "numerous phone calls and messages" from Kay Dean the Respondent's friend which she describes as a form of harassment. (the Tribunal was shown some examples of text messages as JC [34-35]).

46. Despite allegations of the premises being unsafe and not having appropriate fire safety precautions, no independent evidence of these allegations was available or presented to the Tribunal. Laurence Jardine's mother's letter addressed to BCP refers to photographs of the premises taken by Laurence Jardine but these were not included in the hearing bundle for the Tribunal to consider. The Respondent went out of her way to allow Laurence Jardine to use her son's room at the premises at the very beginning of his occupation when he expressed concern he might have to use an Airbnb. The initial agreement evidenced by text messages at LJ [76] was for him to occupy after Jamie Currie had vacated in February 2022, so he could use her room at the premises. Had the Respondent insisted upon this, upon Laurence Jardine's request, there would not have been 5 individuals sharing and the offence most likely would not have been committed: see LJ [76-77].

47. Most of the exchanges which the Tribunal have seen in the hearing bundles with the Respondent were of the kind that might be expected where students share accommodation with someone who has lived at a property as their family home for 20 years. The Respondent's text messages were in a restrained polite and temperate manner and not in the least threatening. Nor were the messages from Kay Dean at [34-35]. None of these allegations come close to amounting to the kind of conduct which might merit an award at the higher end of the scale for this kind of offence. The context of the Respondent suffering a recent bereavement in tragic circumstances makes the messages from Kay Dean at pages JC [34-35] entirely understandable.

48. Nevertheless, the Tribunal has found that the offence was committed and the purpose of the provisions in the 2016 Act is partly deterrent, punitive and to disgorge profit.

49. In the light of the foregoing, the Tribunal takes a figure of 70% of the rent received of £400.00 per month (net of the value of utilities provided by the Respondent) as the amount of the rent repayment order, for each Applicant, for the 24-day period when the offence was committed. The Tribunal has taken an apportionment of the discounted net monthly rent as the amount of the RRO for that 24- day period.

50. The Applicants were each articulate intelligent individuals. Had there been significant prejudice or harm associated with the Respondent's omission to obtain an HMO licence, the Tribunal would have expected to have seen hard evidence of this.

51. The Tribunal was impressed by the Respondent's calm and polite demeanour in the face of the claims to recover (in Jamie Currie's case) very

significant sums from her. She was a credible witness who resisted the temptation to embellish or add to her recollection to support her case.

Financial circumstances of the Respondent

52. The Respondent offered evidence about her financial circumstances in her witness statement which the Tribunal has taken into account.

53. The Tribunal proceeds on the footing that the Respondent's financial circumstances are very limited.

Reimbursement of fees

54. The possibility of resolving the request for an RRO by consent (that is by negotiation or agreement with the Respondent) does not appear to have been considered by either Applicant. Nor did they appear to have sought advice (apart from initial advice from BCP's officer) according to responses to questions from the Tribunal. When asked whether there was a letter of claim before the RRO was issued, neither were able to point to such a letter or communication seeking a consensual resolution before the application was issued. Nor was there any evidence that either Applicant considered or made any offer of settlement.

55. The Tribunal encourages alternative dispute resolution as it can in some cases minimise the use of resources by the parties and the Tribunal. As this was a case where neither Applicant was able to demonstrate that a Tribunal hearing was required to obtain an RRO, and no attempt appears to have been made to pursue negotiation, the Tribunal does not consider it appropriate to order the Respondent to reimburse either Applicant for the application fee or hearing fee.

This has been a remote hearing in part which has been consented to by the party who attended remotely Laurence James David Jardine. The form of remote hearing was CVPREMOTE. All issues could be determined in a remote hearing in that application. The documents that we were referred to are in Laurence James David Jardine's bundle of 84 numbered pages, including his rent repayment order application and the Respondent's solicitor's (undated) written submissions (36 paragraphs) the gist of which is recorded in the reasons given above.

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.