



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

Case Reference : **LON/00BG/HMF/2022/0185**

Type of hearing : **V: CVPREMOTE**

Property : **Flat 5, Waverton House, Jodrell Road, London, E3 2LG**

Applicant : **Maria Ciach**

Representative : **Cameron Neilson of Justice for Tenants**

Respondent : **Lauren Clements**

Representative : **In person**

Type of Application : **Application for Rent Repayment Order under the Housing and Planning Act 2016**

Tribunal Members : **Judge P Korn
Ms R Kershaw**

Date of Hearing : **27 February 2023**

Date of Decision : **27 March 2023**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. 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 to which we have been referred are in electronic bundles, the contents of which we have noted. The decisions made are set out below under the heading “Decisions of the tribunal”.

Decisions of the tribunal

- (1) The tribunal makes no rent repayment order.
- (2) The tribunal makes no order in respect of the application fee or the hearing fee.

Introduction

1. The Applicant has applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 (“**the 2016 Act**”).
2. The basis for the application is that the Respondent was controlling and/or managing a house in multiple occupation (an “**HMO**”) which was required under the Housing Act 2004 (“**the 2004 Act**”) to be licensed at a time when it was let to the Applicant but was not so licensed and that the Respondent was committing an offence under section 72(1) of the 2004 Act.
3. The Applicant’s claim is for repayment of rent paid between 1 October 2021 and 31 March 2022 in the amount of £3,292.11.

Applicant’s case

4. The Applicant states that the Property was situated within an additional licensing area as designated by the London Borough of Tower Hamlets and that the additional licensing scheme came into force on 1 April 2019. The additional licensing scheme was implemented across most of the borough, including the part of the borough in which the Property is situated. The Property met all of the criteria requiring it to be licensed under the said designation.
5. The Property is a 2-bedroom self-contained flat in a purpose-built tower block with a shared kitchen and bathrooms and was occupied by at least 3 people at all points during the period of claim. Each tenant occupied their own room on a permanent basis, with one tenancy agreement for all of the tenants. It was a standard HMO arrangement,

there being communal cooking and toilet and washing facilities, with multiple households each paying rent and occupying their rooms as their only place to live. The appropriate HMO licence was not held during the period of claim, and no licence application was made at any point during the Applicant's tenancy.

6. Lauren Clements is believed by the Applicant to be an appropriate respondent for this application because she is named as the landlord in the tenancy agreement and is the beneficial owner of the Property as shown by the land registry title document in the Applicant's hearing bundle. She is therefore a "person having control" of the Property and a "person managing" the Property for the purposes of section 263 of the 2004 Act.

Respondent's case

7. The Respondent states that she originally bought the Property to live in herself in 2015, but when lockdown started due to the Covid pandemic she was stuck overseas and decided to rent the Property out. She advertised and got a message from a Mr Miszczak asking to view the Property. He was shown the Property with his friend Julia, and the two of them decided to rent the Property. Early in 2021 Julia moved out. The first that the Respondent heard of the Applicant herself was when her gas engineer, Mr Keats, attended the Property on 13 October 2021. Mr Keats informed the Respondent that a girl called 'Mary' was living there and had been doing so for some time.
8. The Respondent attended the Property on 20 October 2021 accompanied by her father and by Mr Karl Mcwilton, her estate agent, with the intention of making everything in order so that she could then return overseas with the estate agent handling matters on her behalf. Mr Mcwilton then went through with her everything that she needed to do and they discussed whether she needed an HMO licence. The two tenants and the Applicant (who she regarded as a squatter) told everyone present that they were related, and it was decided that therefore an HMO licence was not needed. At a later date all three occupiers signed to confirm this statement. She also asked the three of them on what date the Applicant had moved in and they said that it was a few days previously. She knew this to be false as Mr Keats had already met the Applicant a few weeks previously and she had stated then she had been at the Property for some time.

Follow-up by Applicant

9. The Applicant accepts that she and the other occupiers signed a letter stating that they were related, but she states that they were not in fact related and that the Respondent offered to write the letter having told the occupiers that it would benefit all of them as the rent would not

increase and the Respondent would save time and money by not having to apply for a licence.

10. The Applicant submits that the Respondent either a) had knowledge of the HMO regulations and persuaded the occupiers to sign the letter in order to circumvent the HMO licensing regulations or b) was negligent in that she did not take any steps to ascertain whether the statement that the occupiers were related was in fact true. She invites the tribunal to infer that the negligence of the Respondent in determining the true nature of the relationship between the Applicant and the other tenants was 'wilful' negligence.

Further relevant submissions at the hearing

11. Mr Neilson for the Applicant accepted that the letter stating that the Applicant and the other occupiers were related was a genuine letter signed by all three of them. However, it was the Applicant's position that the Respondent either knew that they were not in fact related or had reason to doubt that they were related.
12. The Respondent said that the Applicant moved into the Property without the Respondent's knowledge.

Witness evidence

13. When asked about the fact that she had lied about her relationship with the other occupiers in a signed statement the Applicant said that "it was nothing". When asked by the Respondent why she had said when they met on 20 October 2021 that she had only been in occupation for a couple of days the Applicant said that she did not recall having said this.
14. When asked about the meeting at which the issue came up about the occupiers being (or allegedly being) related, the Applicant said that she did not remember the details of the meeting. She also accepted that the Respondent had not been told about the Applicant moving in; she said that one of the other tenants had told her that he had informed the Respondent.
15. The Respondent was asked about the processes that she had in place to check that she was complying with the law when renting out property, and she said that she used an estate agent although she accepted that this was only the case when she returned to the United Kingdom.
16. The Respondent accepted that she drafted the letter about the occupiers being related, but this was because she wanted written proof of this for her own protection, once the occupiers had told her that they were related.

Relevant statutory provisions

17. Housing and Planning Act 2016

Section 40

- (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 ...
- (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.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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
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Section 41

- (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.

Section 43

- (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 41.
- (3) The amount of a rent repayment order under this section is to be determined in accordance with – (a) section 44 (where the application is made by a tenant) ...

Section 44

- (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.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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
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- (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.

Housing Act 2004

Section 72

- (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 ... but is not so licensed.
- (5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1)

Section 263

- (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.

Tribunal's analysis

- 18. The Applicant's evidence, which is uncontested on this point, is that the Property was not licensed at any point during the period of the claim. A licence was required, according to the Applicant, because the Property was in an additional licensing area as designated by the local housing authority and it met the requirements for it to need a licence.
- 19. Having considered the parties' submissions and the documentation in the hearing bundles we are satisfied that the Property was within the area of designation and that it will have needed an HMO licence if and for so long as it was being occupied by at least 3 people in 2 or more households. Having considered the evidence, we are satisfied beyond reasonable doubt that the Property required an HMO licence for the whole of the period of claim and that it was not licensed.
- 20. We are also satisfied on the basis of the evidence before us that the Respondent was the landlord for the purposes of the 2016 Act and that she was a "person having control" of the Property and/or a "person managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

The defence of "reasonable excuse"

- 21. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence, although the tribunal can and should consider a 'reasonable excuse' defence even if the person relying on it does not use the specific language of 'reasonable excuse' or refer to section 72(5) of the 2004 Act. We are satisfied in this case that the Respondent wishes to rely on the 'reasonable excuse' defence.

22. The Respondent states that the Applicant and the other occupiers told her that they were related and that she asked them to sign a statement to confirm this, which they agreed to do. The Applicant's position is that the Respondent encouraged her and the other occupiers to state that they were related whilst either knowing or suspecting that this was untrue.
23. Having read the parties' respective written submissions and having had an opportunity to cross-examine both the Applicant and the Respondent and to listen to their evidence when questioned by others, we consider the Respondent to be the more credible witness on this issue. The Applicant made it clear in oral evidence that she did not consider it to be a particularly serious matter to make an untrue signed statement, and she has brought no independent proof that the Respondent asked her to lie. She has no testimony from the other tenants in support of her position, and generally she did not come across as a particularly reliable witness.
24. The Respondent did have her own failings; for example, there was no evidence that she did anything to keep herself informed as to her legal obligations in relation to the renting out of the Property whilst she was abroad. However, on the issue of the signed letter we are not persuaded that she pressured the tenants into signing the letter or that she knew the statement to be untrue at the time, and nor are we persuaded that she ought to have known that they were unrelated or that she ought to have delved further having been told by them that they were related and having taken the precaution of asking them to confirm this in writing.
25. As to the precise background to the signing of the letter, the question arises as to why the Applicant and the other occupiers would have chosen to identify themselves as being all one family. One possible explanation is that as the Applicant started occupying the Property without the Respondent's knowledge perhaps she and the other occupiers concluded that the best way of explaining her unauthorised presence was to tell the Respondent that she and the other occupiers were all one family. Another possibility is that the Respondent told the Applicant and the other occupiers that they could not continue to stay because (a) they were presumed to be unrelated and (b) the Respondent did not have an HMO licence, and that they then responded by assuring the Respondent that they were in fact related. But whatever the actual explanation, our view – taking all the evidence and circumstances together – is that the Respondent did not know at the time that the occupiers were unrelated and that it was reasonable in the circumstances for her to have relied on their signed joint statement that they were all one family.
26. It is clear that the Property would not have required an HMO licence if the occupiers had in fact been occupying as one household. As our

finding is that the Respondent believed that they were occupying as one household and that it was reasonable in the circumstances for her to have relied on their signed joint statement that they were occupying as one household, it follows that the Respondent had a reasonable excuse for the purposes of section 72(5) of the 2004 Act for not having obtained an HMO licence. That reasonable excuse continued for the entirety of the period of claim as there is no evidence before us that the Respondent found out during the period of claim that the occupiers were unrelated or that anything happened during that period which means that the Respondent ought to have investigated the position further.

27. In coming to the above conclusion we have had regard to the test set out in the decision of the Upper Tribunal (Tax Chamber) in *Perrin v HMRC (2018) UKUT 0156 (TCC)* which was quoted with approval in the decision of the Upper Tribunal (Lands Chamber) in *Marigold and others v Wells (2023) UKUT 33 (LC)*, albeit that some of the language of that test is more specifically applicable to tax cases than to rent repayment cases.
28. As the Respondent had a reasonable excuse for the purposes of section 72(5) of the 2004 Act for not having obtained an HMO licence and as this reasonable excuse continued for the whole of the period of claim, this is a complete defence to what would otherwise have been a criminal offence under section 72(1) of the 2004 Act. Under section 43(1) of the 2016 Act, *“the First-tier Tribunal may [i.e. may only] make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence ...”*. As the Respondent has a defence under section 72(5) of the 2004 Act, she has not committed an offence and the tribunal does not have the power to make a rent repayment order against her. Accordingly, the application for a rent repayment order is refused.

Cost applications

29. The Applicant has applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.
30. As the Applicant has been unsuccessful in their claim, it is not appropriate to order the Respondent to reimburse these fees.

Name: Judge P Korn

Date: 27 March 2023

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.