In the FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Tribunal Case reference	**:**	**LON/00BG/HMF/2022/0284**
Property	**:**	**27 Casson Street, London E1 5LA**
Applicant	**:**	**Sarunas Spakovas, Aiono Maaria Manty, Damian Urbansky, Peter Westbury**
Representative		**Muhammed Williams of the London Borough of Tower Hamlets**
Respondent	**:**	**Anwar Khan**
Representative		**In person**
Type of application	**:**	**Rent repayment order**
Tribunal Judge	**:**	**Judge Adrian Jack, Tribunal Member Mann MCIEH**
Date of decision	**:**	**19th June 2023**

DECISION

IMPORTANT – COVID 19 ARRANGEMENTS

This matter was determined after a hearing face-to-face. The applicant tenants and the respondent landlord submitted electronic bundles.

Procedural

1. The four applicant tenants allege that they each rented a room in a house which they allege was an unlicensed house-in-multiple-occupation ("HMO"). Although each of their agreements is expressed to be licence not a tenancy, in accordance with the House of Lords decision in *Street v Mountford* [1985] AC 809, they are in our judgment tenancies as a matter of law. Mr Khan, the landlord, did not dispute this.

2. The dates in respect of which a rent repayment order is sought are as follows:
   Mr Spakovas 8th January 2022 to 5th March 2022
   Ms Manty 6th September 2021 to 16th February 2022
   Mr Urbansky 1st August 2021 to 5th March 2022
   Mr Westbury 1st August 2021 to 1st February 2022

3. The Tribunal heard the matter as an in-person case at 10 Alfred Place. The tenants were represented by Mr Williams of the London Borough of Tower Hamlets. Only Mr Spakovas and Mr Urbansky of the tenants appeared. Ms Manty and Mr Westbury did not appear. Mr Williams made no application for them to give evidence by video-link, so the Tribunal heard no live evidence from them. Mr Khan represented himself.

4. Mr Williams opened the case to us. We then heard evidence from Mr Urbansky and Mr Spakovas. Each was cross-examined by Mr Khan. The Tribunal also asked questions of them. Mr Williams was given an opportunity to reexamine them. Mr Williams then closed his case.

5. The Tribunal then considered whether the applicants had shown a case for Mr Khan to answer. We concluded that they had not. In consequence we dismissed the claim for a rent repayment order. We said that we would put our reasons in writing. These are those reasons.

The law

6. Section 40 of the Housing Act 2016 confers power on this Tribunal to make a rent repayment order "where a landlord has committed an offence to which this Chapter applies." The only relevant offence is that in section 72(1) of the Housing Act 2004 (control or management of an unlicensed HMO). Under section 41 a tenant can apply for a rent repayment order in respect of housing let to him in breach of, inter alia, section 72(1). By section 43(1) this Tribunal may only make a rent repayment order if it is satisfied beyond reasonable doubt that a landlord has committed a relevant offence, here under section 72(1).

7. Because cases have to be proved to the criminal standard of proof, the burden is on the tenant to establish that an offence has been committed. The landlord has the right to silence. There is no provision for judgment by default.

8. Because the proceedings are of a quasi-criminal nature, as in contempt of court proceedings before the civil courts, the Tribunal at the conclusion of the applicants' case must consider whether there is a case for the respondent to answer. This procedure is very common in criminal cases tried in the Crown Court or the Magistrates' Court. In most civil cases, a defendant can also make a submission of no case to answer. However, (save in civil jury trials) a defendant is "put to his election", in other words if the defendant makes the application he is debarred from adducing any evidence if the Court holds that there is a case to answer.

9. This rule does not apply in quasi-criminal matters tried in the civil courts. A respondent against whom an order for committal for contempt is sought is entitled to make a submission of no case to answer without being put to his election. If the submission of no case succeeds, then the application to commit is dismissed. However, if the submission fails, the respondent can still adduce evidence on his own behalf.

10. In the First-tier Tribunal, submissions of no case to answer are vanishing rare. However, in a quasi-criminal jurisdiction such as the present, in our judgment, the Tribunal must examine the evidence adduced by the tenants to ensure that each element of the relevant offence is made out. If there is no evidence on which we could properly find that any element has properly made out, then we would be bound to find that the landlord had no case to answer.

11. Section 254 of the 2004 Act defines an HMO (so far as material to the current case) as follows:

> "(1) For the purposes of this Act a building or a part of a building is a 'house in multiple occupation' if—
>
> (a) it meets the conditions in subsection (2) ('the standard test');
>
> (b) it meets the conditions in subsection (3) ('the self-contained flat test');
>
> (c) it meets the conditions in subsection (4) ('the converted building test');
>
> (d) an HMO declaration is in force in respect of it under section 255; or
>
> (e) it is a converted block of flats to which section 257 applies.
>
> (2) 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.

12. Mr Williams relied solely on section 254(1)(a), the standard test, to prove liability on the landlord's behalf. Section 259 is irrelevant in the current case.

13. Regulation 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 provides:

> "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."

The evidence

14. It was common ground between the parties that the property had a basement, ground floor and first, second and third floors. The basement consisted of a utility room and another room which was originally used for storage but later became another bedroom. The ground floor had the communal kitchen and one bedroom. The first and second floors each had two bedrooms: a larger room at the front and a smaller room at the back. There was one room on the top floor.

15. It was also common ground that the landlord applied for a HMO licence on 6th March 2022, so that the last day in respect of which a rent repayment order could be made was 5th March 2022. The HMO licence was granted on 27th April 2022.

16. Mr Williams and the four tenant applicants made witness statements. Electronic bundles were also prepared by both sides.

17. None of these witness statements deal with issues as to the "only or main residence" of the various occupants. In oral evidence each of Mr Spakovas and Mr Urbansky gave evidence that the property was their own ordinary residence. They gave no evidence as to the only or main residence of other occupants of the property.

18. As to other occupants, Mr Urbansky was able to give evidence that he moved in on 1st August 2021. It appears that the property had been empty for a substantial time during Covid. Mr Urbansky moved in at the same time as a man called Chris, who occupied the third floor room, and Jamil, who occupied the second floor back room. Mr Urbansky occupied the second floor front room. Mr Westbury, he said, moved into the first floor front room in either the first or second week of August (although we note his licence agreement runs from 1st August 2021). Ms Manty moved into the first floor back room in September 2021. A woman, Alex, moved into the ground floor room in September too, as did a man, Sev, who took the basement room. Mr Urbansky was unclear about the dates in September.

19. There was, Mr Urbansky said, a large turnover of occupants, but generally the landlord was able to fill a room within a few days of the former occupant leaving, if he had not filled it during the occupant's notice period. Ms Manty had moved out and sub-let her room. Mr Urbansky was unclear on the dates of this. He thought it was after 5th March 2022, but this is inconsistent with the dates of the rent repayment order sought by Ms Manty, who only sought an order up to 16th February 2022.

20. Mr Khan put to Mr Urbansky that he had been carrying on a business of the sale of electronic scooters from his room. Mr Urbansky denied this and said that the only scooter he had sold was his own personal scooter. He had sold it, he said, to Jamil.

21. Mr Spakovas gave evidence that he moved into the third floor flat on 8th January 2022. At that time, there were a woman, Nikki, living in the basement room, and a man, Alex, on the ground floor. Mr Westbury and Ms Manty were in the front and back first floor rooms respectively. Jamil and Damien occupied the second floor rooms. The balance of his evidence was concerned with various defects alleged in the property.

Decision on whether there is a case to answer

22. We turn then to our consideration of whether the tenants have established a case to answer. We can dispose of one matter simply. Mr Khan's case is that Mr Urbansky was carrying on a business from his room involving the sale of e-scooters. If that is right, then, even if the room was his only or main residence, his occupation would fall foul of section 254(2)(d), because the occupation would not be exclusively

residential. Mr Urbansky denied carrying on a business. In our judgment, there is evidence on which a properly directed Tribunal could conclude that no business was being carried on. There is therefore a case to answer in respect of this point.

23. We turn to the other aspects of the case. During August the sole evidence before us, that of Mr Urbansky, was that there were only three occupants of the property originally with Mr Westbury moving in a short time later. During this month, there were not the necessary five occupants to require mandatory HMO licensing. In September, Ms Manty's licence agreement provides for her occupation to commence on 8th September 2021, there is therefore evidence that by 8th September 2021 there were five occupants.

24. In our judgment we can make a positive finding that no HMO licence was required before 8th September 2021. There is therefore no case to answer in respect of that period.

25. In the period 8th September 2021 up to 5th March 2022, there seem mostly to have been seven occupants with occasional drops during voids. The key question is therefore whether there is evidence which would properly allow conviction on an offence under section 72(1) that at least five of the occupants occupied the property as their only or main residence.

26. As we have said, the only direct evidence of this comes from Mr Urbansky and Mr Spakovas and only in respect of themselves. Neither Ms Manty nor Mr Westbury say this, although it would have been easy for them to have done so. No effort has been taken to adduce any evidence in respect of any of the other occupants.

27. In our judgment, the absence of evidence that the property was the only or main residence of any of the occupants (apart from Mr Urbansky and Mr Spakovas) is fatal to the applicants' case. Take, for example, Ms Manty. We know that she had sub-tenants (although precisely when is unclear). An obvious question for her in cross-examination (if she had attended the Tribunal) would have been where she was living whilst the sub-tenants were at the property. Follow up questions would have included asking how long that accommodation had been available to her and whether the Casson St address was just a pied-à-terre.

28. In order to find that the landlord has committed an offence under section 72(1), the tenants must prove to us beyond reasonable doubt that there were at least five occupants of the property who occupied it as their only or main residence. It is not for the landlord to disprove this. In the absence of — even just formal — evidence from the other occupants, in our judgment no reasonable Tribunal, properly directed, could conclude that at least five occupants did occupy the property as their only or main residence.

29. For these reasons, we hold that the tenant has not established a case to answer. We find that the tenant has not adduced evidence on which the Tribunal could properly find that the landlord has committed an offence under section 72(1) of the Housing Act 2004. Accordingly, we dismiss the claim for a rent repayment order.

Costs

30. As to costs, the Tribunal has a discretion as to the costs payable to the Tribunal. As the tenants have lost, those costs should fall on them. Accordingly, we make no order for costs.

DECISION

We dismiss the tenants' application with no order in respect of the costs payable to the Tribunal.

Judge Adrian Jack 19th June 2023