FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AE/HMF/2020/0097**
HMCTS code (paper, video, audio)	**:**	**P: CVPREMOTE**
Applicants	**:**	**(1) Sailma De La Cruz Alcantara** **(2) Velizar Georgiev Velikov**
Representatives	**:**	**In person**
Respondent	**:**	**Ali Mohamed**
Representative	**:**	**In person**
Type of application	**:**	**Application under sections 40, 41, 43 & 44 of the Housing & Planning Act 2016 in respect of a Rent Repayment Order**
Tribunal members	**:**	**Tribunal Judge I Mohabir** **Mr A Parkinson MRICS**
Date of hearing	**:**	**29 March 2021**
Date of decision	**:**	**29 March 2021**

DECISION

Covid-19 pandemic: 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: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Introduction

1. This is an application made by the Applicants under section 41 of the Housing and Planning Act 2016 ("the Act") for a rent repayment order against the Respondent in respect of 16 Cornwall Gardens, London, NW10 2QX ("the property").

2. The property is described as being a converted house with 5 en-suite bedrooms with communal cooking facilities for the occupiers.

3. The First Respondent is the registered proprietor of the property.

4. It is common ground that an assured shorthold tenancy agreement of a room in the property was jointly granted in the name of the Respondent to the Applicants dated 15 August 2018 "the tenancy agreement"). The commencement date of the tenancy was 25 August 2018. Although the tenancy agreement stated that the term was for 6 months, the termination date stated on the agreement was 24 August 2019. In any event, this does not matter because the Applicants remained in occupation until21 September 2020. The rent paid by the Applicants throughout their occupation was £900 per month.

5. It is also common ground that on 28 August 2019, Brent Council inspected the property and found it to be a house in multiple occupation ("an HMO"). On 30 December 2019, Brent Council served the Respondent with a Notice of Intent to issue a financial penalty in the sum of £5,000 in relation to various offences under sections 72 and 234 of the Housing Act 2004 (as amended) ("the 2004 Act"). The decision was made final by a notice dated 19 August 2020.

6. By way of background, the Respondent told the Tribunal that he is the owner of 3 other properties in Brent that were also let as HMO's at the time and were unlicensed. They were also the subject matter of financial penalties issued by Brent Council. The Respondent told the Tribunal that he had appealed all of the financial penalties, although there was no evidence of this before the Tribunal.

7. It is also common ground that on 4 September 2019 the Respondent applied for an HMO licence for the property, which was granted on 21 October 2019.

8. By an application dated 24 June 2020, the Applicants made this application for a rent repayment order against the Respondent.

Procedural

9. Both parties filed late evidence on 23 March 2021. The Applicants' evidence consisted of an email from the Enforcement Officer, Mr Pang, at Brent Council

dated 22 March 2021, which did no more than confirm the factual events set out above regarding the offences committed by the Respondent and his successful application for an HMO licence. This was not objected to by the Respondent and was admitted by the Tribunal.

10. The Respondent's late evidence was the HMO licence, a supplementary witness statement mainly consisting of comment and various letters from estate agents in 2018 commenting on the occupation of some rooms in his properties at 16 and 25 Cornwall Gardens.

11. Save for the HMO licence, the Tribunal refused the Respondent permission to admit the other late evidence because there was no reasonable explanation as to why it had not been served earlier and that it introduced new evidence at a late stage, which the Tribunal was satisfied would cause the Applicants significant prejudice.

Relevant Law

Making of rent repayment order

12. Section 43 of the Housing and Planning Act 2016 ("the Act ") provides:

"(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—

(a)section 44 (where the application is made by a tenant);

(b)section 45 (where the application is made by a local housing authority);

(c)section 46 (in certain cases where the landlord has been convicted etc).

Amount of order: tenants

13. Section 44 of the Act provides:

(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
an offence mentioned in row 1 or 2 of the table

in section 40(3)	
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	
the amount must relate to the rent paid by the tenant in respect of	
the period of 12 months ending with the date of the offence	
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."

Hearing

14. The remote video hearing in this case took place on 26 March 2021. Both the Applicants and the Respondent appeared in person and the Tribunal heard submissions from both parties.

15. The issues before the Tribunal were whether an offence had been committed by the Respondent under section 40 of the Act and whether it was appropriate to make a rent repayment order. If so, the amount of any such order in respect of each of the Applicants.

16. The Applicants seek a rent repayment order under section 44 of the Act for the 12-month period prior to 28 August 2019 in the sum of £10,800 (£900 per month) on the basis that the Respondent had committed the following offences:

    (a) that property was an unlicensed HMO in breach of section 72 of the 2004 Act; and

    (b) that the Respondent had committed the various breaches of the Management of Houses in Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations"), which in turn amounted to a

breach of section 234 of the 2004 Act.[1]

17. Put simply, the Respondent's case is that the Applicants (and other occupiers) were no more than lodgers or licensees until 1 or 2 weeks before the inspection by Brent Council on 28 August 2019 because the property was a family home occupied in part by his daughter and his son in law. It was, therefore, exempt from the requirement to have an HMO licence.

18. Thereafter, he overlooked the fact that it had become an HMO and required to be licensed. Once he became alerted to this fact by the inspection by Brent Council, he promptly applied on 4 September 2019 for a licence, which was later granted.

Lodgers or Tenants?

19. It was not necessary for the Tribunal to make a finding about whether the Respondent's daughter and his son in law occupied the property for the 12-month period prior to 28 August 2019 because, as a matter of law, they were not owner-occupiers or resident landlords within the meaning of paragraph 10 in Schedule 1 of the Housing Act 1988 (as amended). Whether or not they were in occupation is, therefore, irrelevant. The Respondent is the owner/landlord and he did not contend he was in occupation at the time. Therefore, the Tribunal concluded that the Applicants' tenancy was not exempt within the meaning of paragraph 10 in Schedule 1 of the Housing Act 1988 and the Applicants were in fact assured shorthold tenants. By extension, the Tribunal also concluded that the other occupiers of the property had to be protected tenants.

20. Furthermore, that conclusion is supported by the fact that the Respondent granted the Applicants an assured shorthold tenancy agreement. This was a formal legal document that acknowledged the landlord and tenant relationship and, it seems, that the Respondent also undertook the legal requirement of protecting the deposit paid by the Applicants using a TDS scheme. Although the Respondent argued that he did not personally grant the tenancy agreement, he nevertheless accepted that he was legally the landlord named in the agreement and was "responsible".

21. It follows that the property was not exempt from the legal requirement to be licensed if it was an HMO at the relevant time.

Was the Property an HMO Prior to 28 August 2019?

22. The Tribunal found the Applicants to be credible witnesses and accepted their evidence that when they commenced occupation there were 2 other couples already living in 2 rooms at the property. Indeed, in evidence, the Respondent accepted this.

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[1] found at pages 88-89 of the Applicant's bundle

23. The Tribunal had little difficulty in finding that at the time the Applicants commenced their occupation at the property there were 6 occupants in total living in 3 separate households. Therefore, given the structure and shared amenities provided to the occupiers, the Tribunal concluded that the property satisfied the definition of an HMO within the meaning of section 77(a) and 254 of the 2004 Act and that the property required a licence. It was common ground that the property was not licensed at the time.

Breach of Regulations

24. The various breaches of the Regulations set out in the Final Notice to Issue a Financial Penalty served by Brent Council dated 19 August 2020 were not challenged by the Respondent. Indeed, the Respondent said in evidence that he attempted to attend to these shortly after the inspection visit on 28 August 2019. The inference drawn by the Tribunal is that the various breaches set out in the notice existed at the time the Applicants commenced their occupation. The Tribunal found in those terms and concluded that they amounted to a breach of section 234 of the 2004 Act.

25. The Tribunal was, therefore, satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act, namely, that he had been in control or management of an unlicensed HMO.

26. It follows that the Tribunal was also satisfied that it was appropriate to make a rent repayment order under section 43 of the Act in respect of the 12-month period preceding 28 August 2019.

27. As to the amount of the order, the Tribunal must regard to the criteria in section 43(4) of the Act:

(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).

28. Guidance was given by the Upper Tribunal in ***Vadamalayan v Stewart*** [2020] UKUT 0183 (LC) as to how the assessment of the quantum of a rent assessment order should be approached. The starting point is that any order should be for the whole amount of the rent for the relevant period, which can then be reduced if one or more of the criteria in section 43(4) of the Act or other relevant considerations require such a deduction to be made. The exercise of the Tribunal's discretion is not limited to those matter set in section 43(4).

29. There was no evidence of the Respondent's financial circumstances to which the Tribunal could have regard. Save for various assertions made from

"memory" about his financial circumstances, the Respondent had not made any proper financial disclosure.

30. As to the Respondent's conduct, on his own case, he said that he was a professional landlord with approximately 30 years experience. He also said that he knew *"the rules and regulations"*, but found it difficult to keep up to date with them. He conceded that the property had previously been licensed. The Tribunal was satisfied that this did not provide him with a defence to liability for failing to obtain a licence.

31. The Tribunal also had regard to the fact that this property and the Respondent's 3 other properties in the Brent area were all unlicensed. They only became so when Brent Council intervened. Given the Respondent's acknowledged experience and expertise as a professional landlord of many years, the only reasonable inference to be drawn from his conduct is that he either had a blatant disregard for the legal requirement to obtain an HMO for this and his other properties or was reckless about that matter. At no stage has the Respondent accepted any degree of culpability. Furthermore, the Tribunal was satisfied that had Brent Council not intervened, the Respondent would not have acted to obtain a licence for the property.

32. In other words, there was no mitigating evidence, which would allow the Tribunal to reduce the amount of the order.

33. Accordingly, the Tribunal made a rent repayment order in favour of the Applicants in the sum of £10,800 for the 12-month period preceding 28 August 2019.

Tribunal Judge I Mohabir

29 March 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).