



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

**Case References** : **BIR/41UF/HMJ/2022/0012**

**Subject Property** : **Prestwood House  
Wolverhampton Road  
Prestwood  
Stourbridge  
West Midlands  
Dy7 5AL**

**Applicant** : **Allan Holden**

**Respondent** : **VPS (UK) Limited**

**Type of Application** : **Application under section 41(1) of the  
Housing and Planning Act 2016 for  
rent repayment orders**

**Date of Hearing** : **19 October 2022**

**Tribunal Members** : **Deputy Regional Judge Nigel Gravells  
Mr Robert Chumley-Roberts MCIEH, JP**

**Date of Decision** : **4 November 2022**

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**DECISION**

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## Introduction

- 1 This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').
- 2 Part 2 of the Housing Act 2004 ('the 2004 Act') introduced licensing for certain HMOs. Licensing was mandatory for all HMOs which have three or more storeys and are occupied by five or more persons forming two or more households. However, since 1 October 2018 the requirement that the property must have three or more storeys no longer applies.
- 3 Under section 72 of the 2004 Act a person who controls or manages an HMO that is required to be licensed but is not so licensed commits an offence.
- 4 Commission of that offence may lead to a criminal prosecution and conviction or to the imposition by the local housing authority of a financial penalty pursuant to section 249A of the 2004 Act. Furthermore, under section 43 of the 2016 Act the Tribunal may make a rent repayment order in favour of the (former) occupier if it is satisfied beyond reasonable doubt that the landlord has committed an offence under section 72 of the 2004 Act, *whether or not the landlord has been convicted*.

## Facts

- 5 The subject property is a former care home owned by Completelink Limited ('Completelink'). Following the closure of the care home and in order to protect the vacant property against potential trespassers and/or damage, Completelink entered into an agreement with the Respondent for the provision of property guardian services. In summary, Completelink granted to the Respondent the sole and exclusive rights of occupation of the property and the Respondent identified 'property guardians' and arranged for them to occupy the property under the terms of a guardian agreement.
- 6 As Lewison LJ explained in *London Borough of Southwark v Ludgate House Ltd* [2020] EWCA Civ 1637, at [7] –  
[A property guardian is '... a private individual who, usually with others, occupies vacant premises under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters and with the prospect of mitigating liability for non-domestic rates.'
- 7 The Applicant was a licensee and guardian at the subject property under a guardianship agreement with the Respondent. Under the agreement the Applicant was permitted to occupy a bed-sitting room and to use the kitchens and bathrooms shared with other licensee/guardians.
- 8 The relationship between the Respondent and Completelink was difficult and their agreement was terminated on 24 February 2022. South Eastern Guardians Ltd replaced the Respondent from 25 February 2022.
- 9 By an application dated 2 June 2022, the Applicant applied for a rent repayment order under section 41 of the 2016 Act. He alleged that, from 1 February 2021 to 31 January 2022 inclusive ('the relevant period'), the Respondent was controlling or managing the subject property, which, as an

HMO occupied by five or more people forming two or more households, was required to be licensed pursuant to Part 2 of the 2004 Act but was not so licensed. During that period the Applicant paid total license fees of £3,045.00.

- 10 On 23 June 2022 the Tribunal issued Directions for the determination of the application.
- 11 On 19 October 2022 the Tribunal inspected the subject property and a hearing was held at Centre City Tower in Birmingham. The inspection and hearing were attended by (i) the Applicant and (ii) Ms Natasha Taylor, Head of Operations for the Respondent.

### **Statutory regime**

- 12 The statutory regime is set out in Chapter 4 of Part 2 of the 2016 Act. So far as relevant to the present application, the Act provides as follows –

#### **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 ...

(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
...			
5	Housing Act 2004	Section 72(1)	Control or Management of unlicensed HMO
...			

#### **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 —

(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.

...

### **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—

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

...

### **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.

<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 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.

### **Determination of the Tribunal**

13 The Tribunal considered the application in four stages –

(i) Whether the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act in that at the relevant time the Respondent was a person who

controlled or managed an HMO that was required to be licensed under Part 2 of the 2004 Act but was not so licensed.

- (ii) Whether the Applicant was entitled to apply to the Tribunal for a rent repayment order.
- (iii) Whether the Tribunal should exercise its discretion to make a rent repayment order.
- (iv) Determination of the amount of any order.

#### Offence under section 72(1) of the 2004 Act

- 14 In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord of the subject property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 72(1) of the 2004 Act. In reaching that conclusion, the Tribunal took account of three recent decisions of the Upper Tribunal (Lands Chamber) in which the Upper Tribunal examined the application of section 72(1) in the context of property guardianship schemes: see *Kaszowska and others v White* [2022] UKUT 11 (LC); *Global 100 Limited v Jimenez and others* [2022] UKUT 50 (LC); *Global Guardians Management Limited and others v Hounslow LBC and others* [2022] UKUT 259 (LC).
- 15 In the light of those decisions, the Tribunal was satisfied that during the relevant period (i) the subject property was an HMO within the meaning of section 254(2) of the 2004 Act, (ii) that the property was subject to mandatory licensing under Part 2 of the 2004 Act, (iii) that the subject property was not licensed; and (iv) that the Respondent was the person managing the subject property within the meaning of section 263(3) of the 2004 Act.
- 16 Indeed, the Respondent did not dispute any of the elements of the offence listed above.
- 17 However, Ms Taylor did, somewhat tentatively, argue that the Respondent might have a defence under section 72(4) and/or (5) of the 2004 Act, which provide –
- (4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—  
...  
(b) an application for a licence had been duly made in respect of the house under section 63,  
and that ... application was still effective (see subsection (8)).
  - (5) In proceedings against a person for an offence under subsection (1) ..., 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) ....
- 18 Although the Tribunal must be satisfied beyond reasonable doubt as to the element of the offence listed in section 72(1), the standard of proof in relation to the defences in section 72(4) and (5) is the balance of probabilities:
- 19 In relation to the defence provided by section 72(4) the Respondent stated that it had submitted a HMO licence application form to South Staffordshire

District Council on 24 September 2020 and it referred to a document in its hearing bundle. That document is a copy of a HMO licence application form but it is not fully completed and it is neither signed nor dated. Email correspondence between the Respondent and South Staffordshire District Council in December 2021 raises serious doubts as to whether a (valid) application form was ever sent by the Respondent or received by the Council. The Tribunal acknowledges that Ms Taylor was not working for the Respondent at the relevant time and that she was unable to provide any information beyond that contained in the Respondent's hearing bundle. In the circumstances, the Tribunal is not satisfied on a balance of probabilities that the Respondent made a (valid) HMO licence application.

- 20 In relation to the defence provided by section 72(5) the Respondent referred to an email dated 21 January 2022 from Claire Chapman at South Staffordshire District Council to Laura White, Project Manager for the Respondent, in which Ms Chapman seemed to question whether the subject property was an HMO that required to be licensed. (The Tribunal notes that South Staffordshire District Council subsequently granted a HMO licence for the subject property to South Eastern Guardians Ltd in June 2022.) Ms Taylor acknowledged that it was difficult for the Respondent to rely on Ms Chapman's statement to excuse its failure to apply for a licence for the subject property when it claimed that it had submitted a licence application fifteen months earlier. In the circumstances, the Tribunal is not satisfied on a balance of probabilities that the Respondent had a reasonable excuse for managing a HMO that was required to be licensed but was not so licensed.
- 21 In the absence of any defence, the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act.

#### Entitlement of the Applicants to apply for rent repayment orders

- 22 The Tribunal determined that the Applicant was entitled to apply for a rent repayment order pursuant to section 41(1) of the 2016 Act. In accordance with section 41(2), the subject property was let to the Applicant throughout the period that the Respondent was committing the relevant offence; and the offence was committed in the period of 12 months ending with the day on which the application was made (2 June 2022).

#### Discretion to make rent repayment orders

- 23 The Tribunal was satisfied that there was no ground on which it could be argued that it was not appropriate to make a rent repayment order in the circumstances of the present case.

#### Amount of rent repayment order

- 24 In accordance with section 44(2) of the 2016 Act, the amount of an order must relate to rent paid in a period, not exceeding 12 months, during which the landlord was committing an offence under section 72(1) of the 2004 Act. It is not disputed that the Applicant's claim satisfies that condition.
- 25 In accordance with section 44(3) of the 2016 Act, the amount that the landlord is required to repay in respect of a period must not exceed the rent paid by the tenant in respect of that period less any relevant award of

universal credit paid (to any person) in respect of rent under the tenancy during that period.

- 26 Moreover, in *Awad v Hooley* [2021] UKUT 55 (LC) the Upper Tribunal took the view that, where at the beginning of the relevant period the tenant was in arrears with his/her rent, the first payment(s) made during the relevant period should be applied to pay off those arrears – so that for the purposes of section 44(3) of the 2016 Act the sum required to pay off the arrears could not be regarded as rent paid *in respect of* the relevant period.
- 27 Applying those principles, the Applicant claims repayment of £3,045.00, which is the rent paid during the relevant period. The Respondent did not dispute that figure. However, since the Applicant had rent arrears of £400.00 at the beginning of the relevant period, the net rent paid in respect of the relevant period and therefore the maximum amount of a rent repayment order is £2,645.00.
- 28 In accordance with section 44(4) of the 2016 Act, in determining the amount of any rent repayment order, the Tribunal must, in particular, take into account the conduct of the parties, the financial circumstances of the landlord and whether the landlord has been convicted of any of the offences listed in section 40 of the 2016 Act.
- 29 The proper approach that the Tribunal is required to take at the final stage of the determination of the amount of any rent repayment order has been considered by the Upper Tribunal (Lands Chamber) in a series of recent decisions: see *Vadamalayan v Stewart* [2020] UKUT 183 (LC), *Ficcara v James* [2021] UKUT 38 (LC), *Awad v Hooley* [2021] UKUT 55 (LC), *Williams v Parmar* [2021] UKUT 244 (LC), *Aytan v Moore* [2022] UKUT 27 (LC), *Acheampong v Roman and others* [2022] UKUT 239 (LC), *Dowd v Martins and others* [2022] UKUT 249 (LC).
- 30 In *Dowd v Martins and others*, the Upper Tribunal endorsed the approach summarised in paragraph 21 of the decision in *Acheampong v Roman and others* –  
The FTT should:
  - (a) Ascertain the whole of the rent for the relevant period.
  - (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.
  - (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step.
  - (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

- 31 Applying steps (a) to (d) above to the present case, the Tribunal has already determined step (a): see paragraphs 24-27 above.
- 32 Step (b) does not apply in the circumstances of the present case since utility bills were paid by Completelink under its agreement with the Respondent.
- 33 Turning to step (c), the Upper Tribunal has made it clear that in applying section 44(4)(a) of the 2016 Act, the conduct of the Respondent landlord also embraces the seriousness of the offence committed by the Respondent landlord that is the pre-condition for the making of a rent repayment order. The offence of managing an unlicensed HMO is a serious offence, although it is clear from the scheme and detailed provisions of the 2016 Act that it is not regarded as the most serious of the offences listed in section 40(3). Although it is clear from the portfolio of properties managed by the Respondent that the Respondent is a professional landlord who should be fully conversant with the HMO licensing requirements, the Tribunal determines that the relatively less serious offence committed by the Respondent should be reflected in a deduction from the maximum amount of the rent repayment order identified in paragraph 27 above.
- 34 Turning to step (d), the Applicant raised an issue in relation to the conduct of the Respondent. He argued that the Respondent had failed to meet appropriate safety standards in relation to fire alarms, fire doors and the switch from gas-fired to electric central heating. The Tribunal noted that the agreement between Completelink and the Respondent was not entirely clear as to the responsibility for the maintenance of the subject property. Primary responsibility appears to have been with Completelink – and the Respondent paid Completelink a proportion of the licence fees received from the guardians as a contribution to maintenance costs – but it appears that the Respondent also had some responsibilities. However, the Tribunal is not persuaded that the matters of which the Applicant complained justify any adjustment of the amount of the rent repayment order.
- 35 In relation to the conduct of the Applicant, the Respondent referred to the arrears of licence fees at the beginning of the relevant period, which remain unpaid, although the Respondent applied the Applicant's deposit of £250.00 to the arrears when it terminated its agreements with Completelink and with the Applicant. Given that the Tribunal has deducted the arrears in calculating the maximum amount of the rent repayment order (see paragraph 27 above), the Tribunal determines that it would not be appropriate to make any further adjustment of the amount of the rent repayment order.
- 36 Section 44(4)(b) of the 2016 Act requires the Tribunal to take into account the financial circumstances of the landlord. However, the Respondent declined to make any representations in relation to its financial circumstances, save that it asserted that it made no significant profit from its provision of guardian services at the subject property.
- 37 Section 44(4)(c) of the 2016 Act requires the Tribunal to take into account whether the landlord has at any time been convicted of any of the offences listed in section 40(3). The Respondent has no such convictions.
- 38 As Sir Timothy Fancourt stated in *Williams v Parmar* (at paragraph 24), the wording of section 44(4) leaves open the possibility of there being factors other than those expressly referred to in paragraphs (a) to (c) that,



in a particular case, may be taken into account and affect the amount of the rent repayment order. Neither party raised any factors other than those referred to above.

- 39 However, the Tribunal notes (i) the reminder from Sir Timothy Fancourt (at paragraph 43) that *Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities* identifies the factors that a local authority should take into account in deciding whether to seek a rent repayment order as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending; and (ii) the clear indication (at paragraph 51) that the factors identified in the Guidance will generally justify an order for repayment of at least a substantial part of the rent.
- 40 The Tribunal determines that, in order to reflect the factors discussed in paragraphs 33-39 above, the maximum repayment amount identified in the paragraph 27 above should be discounted by £645.00
- 41 The Tribunal therefore orders under section 43(1) of the 2016 Act that the Respondent repay to the Applicant the sum of £2,000.00.

### **Appeal**

- 42 If a party wishes to appeal this Decision, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.
- 43 The application for permission to appeal must be received by the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- 44 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(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- 45 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

4 November 2022

Professor Nigel P Gravells  
Deputy Regional Judge