FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AE/HMF/2020/0199**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**48b Neasden Lane, London, NW10 2UJ**
Applicant	**:**	**Joshua Robinson**
Representative	**:**	**In person**
Respondent	**:**	**JKR Properties Limited**
Representative	**:**	**Jatindar Sandhu (Solicitor Advocate)**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Mel Cairns MCIEH**
Date and Venue of Hearing	**:**	**29 March 2021** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**1 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. We have considered the documents specified in [2] below.

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the Respondent in the sum of £5,355 which is to be paid by 23 April 2021.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 23 April 2021 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. By an application, dated 30 September 2019, the Applicant seeks a Rent Repayment Order ("RRO") against the Respondent pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The Respondent was his immediate landlord of Room 2 at 48b Neasden Lane, London, NW10 2UJ ("the Flat").

2. On 14 December 2020, the Tribunal gave Directions. Pursuant to the Directions, the Applicant has filed a Bundle of Documents of 145 pages (references to which will be prefixed by "A.__"); the Respondent has file a Bundle of 60 pages ("R.__"); and the Applicant has file a brief response (1 page).

The Hearing

3. The Applicant, Mr Joshua Robinson, appeared in person. He is aged 24 and at the material times worked a waiter. Mr Jatinder Sandhu, a solicitor advocate with Percy, Short and Cuthbert, appeared for the Respondent. The Respondent company did not appear. Mr Robinson gave evidence.

4. We are grateful to the assistance provided by both Mr Robinson and Mr Sandhu. Mr Sandhu accepted that Mr Robinson was a good tenant, whilst Mr Robinson had no criticism about his landlord. Both made helpful submissions to the tribunal on two difficult issues which we needed to determine namely: (i) whether the application had been issued in time and (ii) whether the applicant had satisfied us beyond reasonable doubt that the landlord had committed any offence under section 72(1) of the Housing Act 2004 ("the 2004 Act"). We granted a short adjournment to enable the parties to consider the House of Lord's decision in *Dodds v Walker* [1981] 1 WLR 1027 on the computation of time.

The Housing and Planning Act 2016 ("the 2016 Act")

5. Section 40 of the 2016 Act provides (emphasis added):

> "(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
>
> (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

6. Section 40(3) a list of seven offences. This includes an offence under section 72(1) of the 2004 Act of "control or management of an unlicenced HMO".

7. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

8. Section 43 provides for the making of RROs:

> "(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)."

9. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides that for an offence under s.72(1), "a period, not exceeding 12 months, during which the landlord was committing the offence".

10. Section 44(3) provides:

"(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.

11. Section 44(4) provides (emphasis added):

"(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."

The Housing Act 2004 ("the 2004 Act")

12. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. Section 56 permits a local housing authority to designate a description of HMO to be subject to an additional licensing scheme.

13. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide (emphasis added):

"(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 (see section 61(1)) but is not so licensed.
……..

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1),
or
(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

14. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that 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."

15. A licence under Part of the 2004 Act may be held by a person who is not the immediate landlord of the occupier of residential premises. Section 64 lays down no ownership condition for the grant of a licence. The local housing authority ("LHA") must be satisfied that an applicant is a fit and proper person to be the licence holder, and that, out of all the persons reasonably available to be the licence holder in respect of the house, they are the most appropriate person.

16. The expression "person having control" is defined in section 263(1) of the 2004 Act. It is relevant to this application in a number of different respects. It is used to identify the most appropriate person to hold a licence. Where a licence has been granted, the licence holder will be the person on whom any improvement notice will be served, and who may therefore commit the offence under section 30(1). It is also used to identify one of the two categories of persons who may commit the offences under section 72(1) of "having control" or "management" of an unlicensed HMO or house.

17. Section 263 defines the concepts of "person having control" and "person managing":

> "(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."

The Background

18. The Flat at 48b Neasden Lane is on the first and second floor roof extension of a Victorian terraced property. The Flat has been converted to create three bedrooms with ensuite bathrooms (a shower and toilet) on the first floor, and a bedroom and separate bathroom on the second floor. The is no living room. The occupants share a kitchen. The property has gas central heating.

19. Mr Robinson occupied Room 2, which is the middle room on the first floor, between 21 August 2018 and 25 September 2020. He paid £700 per month. This included gas, electricity, water and council tax. We have received no evidence of the amount of these benefits, but Mr Sandhu suggested that these represented some 15-20% of the rent.

20. Mr Robinson signed two tenancy agreements for fixed terms of twelve months (at A.9 and A.88). A deposit was required which was placed in a rent deposit scheme. He was provided with an energy performance certificate. A detailed inventory was annexed to the tenancy agreement. This described the Flat as an HMO (at p.48).

21. The freehold of the property is held by Euro Delux Ltd (A.143). We were not provided with details of the Respondent's interest in the property. It seems to be a linked company with the freeholder. The letting has been managed by Regal Estates.

22. On 7 August 2019, Mr Robinson made inquiries with the London Borough of Brent ("Brent") as to whether the Flat required a licence (at A.110). He complained that there was a problem of a mice infestation, a broken pipe in the wall, and that the landlord did not top up the electricity leaving the tenants with no power to cook, wash or charge their phones. However, at the hearing, Mr Robinson did not seek to overstate these problems.

23. It seems that as a result of Mr Robinson's inquiries, Brent notified the Respondent that a licence was required. It was common ground that this was not an HMO which fell within the statutory licencing requirements, as the Flat was not occupied by more than four people. However, Mr Robinson provided a document "Property Licensing Frequently Asked Questions (FAQs)" dated 1 May 2018 which he obtained from Brent's website (at A.3-8). This recorded that Brent had introduced an additional licencing scheme for the whole borough on 1 January 2015. The scheme would operate for a period of five years until 31 December 2019 which would extend to "almost all HMOs in Brent" not caught be the statutory scheme. Section 4 explained the exception, namely certain "section 257 HMOs". These are properties converted to self-contained flats.

24. On 30 September, the Respondent applied to Brent for a licence (at R.1-8). On 13 January 2020, Brent granted a licence (at A.9-15). This states that Brent had approved an application for a "Mandatory HMO Licence". This licences the Flat for a maximum of six occupants.

Our Determination

Was the Application made in time?

25. There are two critical dates:

(i) At 17.40 on 30 September 2019, the Respondent emailed its HMO licence application to Brent;

(ii) At 19.08 on 30 September 2020, the Applicant emailed his application for a RRO to the Tribunal.

26. There are three relevant legislative provisions:

(i) In proceedings against a person for an offence under section 72(1), it is a defence that, at the material time "an application for a licence had been duly made in respect of the house under section 63" (section 72(4)(b) of the 2004 Act).

(ii) A tenant may apply for a rent repayment order only if "the offence was committed in the period of 12 months ending with the day on which the application is made (section 41(2)(b) of the 2016 Act).

(iii) By Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rule 2013, an applicant must start proceedings before the tribunal "by sending or delivering to the tribunal a notice of application".

27. We are satisfied that the application for a RRO was made in time. We analyse the situation as follows:

(i) We are satisfied that the flat required a licence under Brent's additional licencing scheme and that an application was not "duly made" until 17.40 on 30 September 2019. At that point, the Respondent was able to rely on the statutory defence and ceased to commit an offence under section 72(1). Thus, the last day on which the offence was committed was on 30 September 2019; the offence ceased to be committed at 17.40 on that day. We reject Mr Sandhu's submission that the offence ceased on 29 September 2019.

(ii) The Applicant "made" his application to the Tribunal on 30 September 2020. It is irrelevant that the application was made at 19.08 when the tribunal office would have been closed (see *Van Aken v Camden LBC* [2002] EWCA Civ 1724; [2003] 1 WLR 684). The making of the application by "sending or delivering" the application to the tribunal was a unilateral act and it was therefore irrelevant that there was no one at the tribunal to receive or authenticate the document. Thus, we reject Mr Sandhu's submission that the application was not made until 1 October 2020.

28. The leading House of Lords' authority on the computation of time is *Dodds v Walker*. Section 29 (3) of the Landlord and Tenant Act 1954 provides that no application for a new tenancy under section 24 (1) "shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 25 of this Act." The landlord gave notice on 30 September. The House of Lords held that the last day for making an application was 30 January. Thus, the period of four months started to run at midnight 30th September/1 October and ended at midnight 30th-31st January.

29. The following passages are taken from the speeches (emphasis added):

Lord Diplock at 1029B-C): "My Lords, reference to a 'month' in a statute is to be understood as a calendar month. The Interpretation Act 1978 says so. It is also clear under a rule that has been consistently applied by courts since *Lester v Garland* (1808) 15 Ves 248 [1803-13] All ER Rep 436 that, in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is

not disputed by counsel for the tenant, that when the relevant period is a month or a specified number of months after the giving of a notice the general rule is that the period ends on the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given."

Lord Russell of Killowen at 1030 C/D: "My Lords, it is common ground that in this case the period of four months did not begin to run until the end of the date of the relevant service on 30th September, i.e. at midnight 30th September-1st October. It is also common ground that ordinarily the calculation of a period of a calendar month or calendar months ends on what has been conveniently referred to as the corresponding date. For example, month period, when service of the relevant notice was on 28th September, time would begin to run at midnight 28th-29th September and would end at midnight 28th-29th January, a period embracing four calendar months. It is to be observed that the number of days in the court month period in that example is in one sense inevitably limited by the fact that September and November each contains but 30 days."

30. Thus, applying this decision, the period of 12 months for making this application started to run at midnight on 30 September/1 October 2019 (the last day during which the offence was committed) and ended at midnight on 30 September/1 October 2020. Thus, the application was made to the tribunal at 19.08 on the last possible day.

Are we satisfied beyond reasonable doubt that an offence was committed?

31. Our starting point is section 263 of the 2004 Act (see [16] above). We are satisfied that the Respondent falls within the statutory definition of the "person managing" the property. It received the rent from the four tenants who were in occupation of the property through its agent, Regal Estates.

32. The Tribunal is satisfied beyond reasonable doubt that the Respondent committed an offence under section 72(1) of the 2004 Act. We are satisfied that:

(i) The Flat was an HMO falling within the "standard test" as defined by section 254(2) of the 2004 Act which required a licence (see [15] above):

(a) it consisted of four units of living accommodation not consisting of self-contained flats;

(b) the living accommodation was occupied by persons who did not form a single household;

(c) the living accommodation was occupied by the tenants as their only or main residence;

(d) their occupation of the living accommodation constituted the only use of the accommodation;

(e) rents were payable in respect of the living accommodation; and

(f) the households who occupied the living accommodation shared the kitchen.

(ii) The Flat was an HMO which fell outside the remit of the statutory HMO licencing scheme, but was caught by Brent's additional licencing scheme (see 23 above).

(iii) The Respondent had not licenced the HMO as required by section 61(2) of the 2004 Act. This is an offence under section 72(1).

(iv) The offence was committed over the period of 21 August 2018 (the commencement of the Applicant's tenancy) until 17.40 on 30 September 201, when the Respondent duly made its application to Brent for an HMO licence.

(v) Brent's additional licencing scheme applied from 1 January 2015. The Respondent let the Flat to other tenants prior to the grant of the Applicant's tenancy, when a licence would have been required.

33. Mr Sandhu argued that the Applicant had produced insufficient evidence to satisfy us beyond reasonable doubt that the Flat required a licence under Brent's additional licencing scheme. We disagree. Brent's "Property Licensing Frequently Asked Questions (FAQs)" was sufficient to satisfy us on this point. It was included as part of the Applicant's Case. It was a point that the Respondent could have raised in its Response. It failed to do so. Mr Sindhu suggested that the reference in the licence to an application for a "Mandatory HMO Licence" suggested that the licence was granted pursuant to the mandatory statutory scheme. We disagree. The Flat was only let to four persons and would not therefore have required such a licence. It only required a licence because of Brent's additional licencing scheme. Section 16 of the Brent document expressly states: "additional licencing is a local mandatory scheme".

The Assessment of the RRO

34. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. Section 44 provides that a RRO may not exceed the rent paid over "a period, not exceeding 12 months, during which the landlord was committing the offence". The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit. We are satisfied that the Applicant was not in receipt of any state benefits. He paid his rent from his earnings.

35. We are satisfied that the Applicant is entitled to seek a RRO over the 12 month period 30 September 2018 to 29 September 2019. The Respondent was committing an offence under section 72(1) throughout this period. Mr Sandhu suggested that the twelve period must be restricted to the twelve months leading up to the date of the application. We disagree. There is no such restriction in the legislation.

36. We are satisfied that the maximum RRO which we would be entitled to make is one of £8,400, namely £700 pm over 12 months. We note that this rent includes gas, electricity, water and council tax. However, rent for this purpose includes the entire sum payable to the landlord in money (see Megarry on The Rent Acts (1988) at p.518).

37. Section 44 of the 2016 Act, requires the Tribunal to take the following matters into account:

(i) The conduct of the landlord. Mr Robinson only had mild criticisms of his landlord. We also take into account the relatively high quality of accommodation for this locality, namely the en-suite bathrooms. We also note the circumstances surrounding the grant of the tenancy, namely compliance with the statutory requirements.

(ii) The conduct of the tenant. There has been no criticism of the Applicant's conduct.

(iii) The financial circumstances of the landlord. We have received no evidence on this.

(iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.

38. We have had regard to the recent decisions of the Upper Tribunal in *Vadamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38; *Chan v Bilkhu* [2020] UKUT 289 (LC); and *Ficcari v James* [2021] UKUT 38 (LC). We note the observations of the Deputy Chamber President in the most recent decision (at [51]) that *Vadamalayan* should not be treated as the last word on the exercise of this discretion.

39. We also have regard to the policy objective of the legislation. In *Vadamalayan*, Judge Elizabeth Cooke (at [19]) observed that "Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence". In the subsequent decision of *Rakusen v Jepson* [2020] UKUT 298(LC), the Deputy Chamber President, Martin Rodger QC added (at [64]):

> ".. the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities

of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live, and the main object of the provisions is deterrence rather than compensation.

40. Taking all the above matters into account, we make a RRO in the sum of £5,355:

(i) Our starting point is the maximum figure of £8,400. We are satisfied that we should make a reduction for the gas, electricity, water and council tax which is included in the rent. We have been provided with no figures in respect of these sums, and take the lower figure of 15% suggested by Mr Sandhu reducing the figure to £7,140.

(ii) We assess the RRO at 75% of this net figure of £7,140. The Respondent is a property investment company which has been letting this Flat for some years. The Respondent was the appropriate person to hold the licence. It should have been aware of the statutory licencing scheme.

Judge Robert Latham
1 April 2021

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.