

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 0060 (LC)
UTLC Case Number: RRO/12/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – person in control not the immediate landlord – period by reference to which the order is calculated

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MRS LOUISE IRVINE

Appellant

and

- (1) **DR ANTHONY METCALFE**
- (2) **JODI PATTERSON**
- (3) **MARCUS MILLS**
- (4) **TIMOTHY WESTON**
- (5) **ISABELLA MCREGOR**
- (6) **HARRY JOHNSON**
- (7) **DANIELLA ZUCCALA**

Respondents

**Re: 20 Hailsham Road,
Tooting,
London,
SW17 9EN**

Judge Elizabeth Cooke

Determination on written representations

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The following cases are referred to in this decision:

Goldsbrough v CA Property Management Limited and Gardner [2019] UKUT 311 (LC)
Truman, Hanbury, Buxton & Co Limited v Kerlake [1894] 2 QB 774

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (“the FTT”) imposing a rent repayment order upon the appellant, Mrs Irvine. The order was made on the basis that she had committed the offence of managing or being in control of a house in multiple occupation that required a licence and was not licensed. The appellant was ordered to pay £45,043.88, representing twelve months’ rent from the seven tenants, who are the respondents to this appeal.
2. The appellant sought permission to appeal on a number of grounds, and on one of them permission was given by the Tribunal. For part of the period during which it was a house in multiple occupation the property, 20 Hailsham Road, Tooting was let to a company which sub-let it and received the rent from the respondent tenants. The appellant therefore argued that while that company was receiving the rent she was not in control of the property and was not the landlord who could be ordered to repay it. That argument ran counter to the Tribunal’s decision in *Goldsbrough v CA Property Management Limited and Gardner* [2019] UKUT 311 (LC). When permission to appeal was granted the appeal was stayed pending the Tribunal’s decision in *Rakusen v Jepsen*, in which the Tribunal was about to look again at circumstances similar to those that gave rise to the decision in *Goldsbrough*.
3. The Tribunal in *Rakusen v Jepsen* [2020] UKUT 298 (LC) took the same approach as it had done in *Goldsbrough*, but it has granted permission to appeal to the Court of Appeal. The Tribunal therefore asked the parties whether they sought a further stay in the present appeal. Neither party sought a further stay. Directions were therefore given that the stay would be lifted, that the appeal would be determined under the Tribunal’s written representations procedure, and requiring the appellant if so advised to file written representations by 8 March 2021. She has not done so and the Tribunal therefore proceeds to determine the appeal on the basis of what is said on this point in the Grounds of Appeal, drafted by Mr Stephen Bishop of counsel.
4. Following the grant of permission to appeal, an application was made by the appellant for me to review my refusal of permission on another point, and I agreed to determine that application along with the appeal itself. I discuss this below after considering the appeal itself.

The factual and legal background

5. The appellant is the freeholder of 20 Hailsham Road, Tooting. In February 2016 it was let to Uptown Properties UK Ltd (“Uptown”) for a period of two years. The lease named the appellant’s husband as landlord. Uptown sub-let the property, and the FTT found that “the property had been occupied by some of the applicants since March 2016. The tenants vacated at various times during 2019.” No more than five of them were in occupation at the same time, according to a table of occupancy provided to the FTT by the respondents.

6. The licensing regime for HMOs was established by the Housing Act 2004, and it is not in dispute that the effect of the 2004 Act's provisions together with those of regulations made under them have the effect that a house let to five or more people comprising two or more households requires a licence. The FTT found that in May 2019 a housing officer from the London Borough of Merton visited the property and found that it was an HMO that required a licence and that it did not have one.
7. Section 72(1) of the 2004 Act provides that it is a criminal offence to manage or be in control of an HMO that requires a licence and does not have one. That offence is one of those listed in section 40 of the Housing and Planning Act 2016 in respect of which the FTT may make a rent repayment order.
8. The FTT summarised its findings at its paragraph 29 and 30 as follows:

“29. There is no dispute between the parties that the property was a licensable HMO.

30. There is no dispute between the parties that the tenants had occupied the property between March 2016 and October 2019, when the licensing scheme was operative. It is not disputed that the tenants were in occupation during the period for which the RRO is claimed.”
9. The FTT said that it was therefore satisfied that the property required a licence and had not been licensed during the tenancies, and that it was satisfied that an offence had been committed. It noted the appellant's argument that she was not the landlord for the purposes of the tenants' application and had not been managing the property; Mr Bishop, who represented her before the FTT, said “all management of the tenancies had been undertaken by the agents, or since their liquidation, by Mr Irvine”. The FTT did not record when Uptown went into liquidation. It said:

“32. The Tribunal relies on *Goldsbrough* and considers that Mrs Irvine was the landlord for the purposes of this application. In addition, the terms of the management agreement between Mr Irvine and Uptown, placed the usual responsibilities of a landlord on Mr Irvine. We consider that at all times, Mr Irvine has acted as agent for Mrs Irvine, he has received the rent on her behalf, and dealt with the management of the tenancies on her behalf.”
10. The FTT then went on to determine the maximum amount payable, which is provided by section 44 of the 2016 Act. Section 44(2) states that “The amount must relate to rent paid during ... a period, not exceeding 12 months, during which the landlord was committing the offence”, and section 44 continues:

“(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.”

11. The FTT found that the maximum payable was the amount paid by way of rent over twelve months, which was £46,101.54. In the light of section 44(4) it determined that there was nothing in the conduct of the parties that could justify an adjustment in the amount ordered. As to the landlord’s financial circumstances, the FTT noted that although the appellant said she was not a professional landlord it was not disputed that she owned several properties. The FTT deducted payments made on behalf of the tenants out of the rent for broadband and council tax to arrive at a rent repayment order in the sum of £45,043.88.

The appeal

12. The appellant has permission to appeal, as I said above, on the ground that while the property was sub-let to Uptown she was not the landlord against whom a rent repayment order could be made. It was argued on her behalf that the Tribunal’s decision in *Goldsbrough* was incorrect.

13. In that case the Tribunal explained that liability to make a rent repayment order is not restricted to the immediate landlord of the property:

“32. ... That is not what the 2016 Act says. The only condition that it sets for liability to an RRO are, first, that the person is “a landlord” and second that that person has committed one of the offences. Certainly the person must be a landlord of the property where the tenant lived; section 41(2)(a) requires that the offence relates to housing that, at the time of the offence, was let to the tenant. It does not say that the person must be the immediate landlord of the occupier; if that was what was meant, the statute would have said so.”

14. The FTT did not make any finding as to the date on which Uptown’s lease came to an end, but in the grounds of appeal it is said that Uptown’s liquidator disclaimed the lease in February 2019. Accordingly the property appears to have been let to Uptown for part of the period in respect of which the rent repayment order was made. But in light of the decision in *Goldsbrough* that does not prevent the freeholder being liable to a rent repayment order if the FTT was satisfied that she had committed the offence under section 72(1) of the 2004 Act. The FTT found that she had, because the lease to Uptown left management responsibilities with the freeholder, which had been undertaken on her behalf by Mr Irvine.
15. The issue decided in *Goldsbrough* was further considered by the Deputy President in his decision in *Rakusen v Jepsen* [2020] UKUT 298 (LC), and he reached the same conclusion.

16. No further argument in the appellant's grounds of appeal persuades me to take a different approach. Mr Bishop refers to *Truman, Hanbury, Buxton & Co Limited v Kerslake* [1894] 2 QB 774, which he says is authority for the proposition that the person having control of a property is the person who in fact receives a rack rent from the occupier, which in this case was *Uptown*. I am not assisted by that decision, which was not about liability to a rent repayment order but about the meaning of the word "owner" in the Public Health (London) Act 1891.
17. Accordingly the appeal fails; the involvement of *Uptown* did not prevent the appellant being a person in control or management of the property and did not prevent her, as freeholder, being liable to a rent repayment order.

The occupancy of the property

18. I noted above that the FTT found that it was not disputed that the tenants were in occupation during the period for which the RRO is claimed.
19. I therefore refused permission to appeal on the ground that the property was not occupied by five or more persons for the relevant period, because that did not appear to have been in dispute before the FTT.
20. Following that refusal of permission Mr Bishop wrote to the Tribunal to say that what was in dispute was not the occupancy of the property but the sum ordered to be repaid in light of that occupancy. He explained that it was argued for the respondents before the FTT that the period could include time when there were fewer than five people in the property, whereas the appellant had argued that it could not. According to Mr Bishop the period in respect of which the order was made included time when the property was occupied by fewer than five people. He explained that it was not until May 2018 that there were five or more people in the property, that one or two rooms were vacant for part of March 2019 so that the property did not require an HMO licence during that period, and that Dr Metcalfe vacated the property on 18 August 2019. Mr Bishop pointed to paragraph 23 of the FTT's decision, where it was said:

"Mr Bishop suggested that, due to fluctuating levels of occupancy, the building did not require licensing at all times."

21. Because at that point I had already refused permission to appeal on all but the one ground relating to *Goldsbrough*, I treated Mr Bishop's representations as an application for the refusal of permission to be set aside, and adjourned it to the hearing of the appeal. As things have turned out it was appropriate for the appeal – which was, in the circumstances, bound to fail – to be determined by written representations, and accordingly I invited further submissions on this point, but none have been made.
22. The Tribunal can set aside a decision to refuse permission to appeal only on the basis set out in rule 54 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, which states:

“(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
(a) the Tribunal considers that it is in the interests of justice to do so;
and
(b) one or more of the conditions in paragraph (2) are satisfied.
(2) The conditions are—
(a) a document relating to the proceedings was not sent or delivered to, or was not received at an appropriate time by, a party or a party's representative;
(b) a document relating to the proceedings was not sent or delivered to the Tribunal at an appropriate time;
(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
(d) there has been some other procedural irregularity in the proceedings.”

23. Accordingly the refusal of permission to appeal on the basis of the occupancy of the property could be set aside if there has been some procedural irregularity and it is in the interests of justice to do so.
24. I have considered what is said about this in the grounds of appeal. I had not understood from those grounds that the point in issue about occupancy was in effect the identity of the 12-month period in respect of which the rent repayment order was calculated, but I accept that that is what was intended to have been argued.
25. The FTT does not say what was the twelve month period in respect of which a rent repayment order was sought, nor what was the twelve month period in respect of which it was calculated (nor whether the two were different); it does not appear to have regarded the period as controversial (see the FTT's paragraph 30, quoted at paragraph 8 above), but confusion would have been avoided if it had identified the period and also addressed the arguments made about periods when there were fewer than five people in the property.
26. However, I have been provided with the occupancy table set out by the respondents, and it is clear from that and from the details given by the appellant herself that it cannot have been in dispute that the property was occupied by five tenants between at least May 2018 and early March 2019; there may then have been a gap of a couple of weeks when there were four, or perhaps three people in the property; but that from the end of March until at least August 2019 there were again five people in the property.
27. Therefore there were certainly, on the basis of what the appellant says, more than twelve months in which the property was occupied by five tenants and therefore during which the offence was being committed, albeit with a gap during March 2019. It is not clear from the FTT's decision whether it calculated rent in respect of a continuous 12 month period, with less rent being paid during that gap, or whether it used a non-continuous period. I see no purpose in granting permission to appeal on this point with a view to remitting the matter, if the appeal succeeds, to the FTT for it to decide what is the correct period. I agree with the appellants that where the property is occupied by fewer than five tenants, no offence is being committed, and I disagree with the argument made for the respondents on that point; and therefore I also agree that any such period cannot be included in the twelve months by

reference to which the order is calculated. But I do not see from the FTT's decision that that was what it did. I think it far more likely that it used a discontinuous period of 12 months in order to calculate what was to be repaid. In any event it is likely that it would make an order by reference to such a period if there were to be a re-hearing.

28. Accordingly, whilst it might be arguable that the Tribunal's misunderstanding of the ground of appeal is a procedural irregularity, I do not consider that it would be in the interests of justice to set aside my refusal of permission, and I do not do so.

Conclusion

29. The appeal fails and the order made by the FTT stands.

Judge Elizabeth Cooke

17 March 2021