



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

Case reference: : **MAN/00CB/HMF/2020/0065**

**HMCTS code
(audio,video,paper)** : **V:FVHREMOTE**

Property ; **3 Enfield Terrace, Oxton, Wirral CH43 4UB**

Applicant ; **Abbey Stewart**

Respondents ; **Mark Spence and Myriam Spence**

**Respondents’
Representative** ; **Sarah Mansfield, initially of GWL
Solicitors then Cullimore Dutton Solicitors**

Type of Application ; **Application for a rent repayment order
under Section 41 of the Housing and
Planning Act 2016**

Tribunal Members ; **Judge J.M.Going
I.James MRICS**

Dates of Hearing ; **21 April 2021**

Date of Decision ; **7 May 2021**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote Full Video Hearing which has been consented to by the parties. The form of remote hearing was V.FVHREMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to were in a series of electronic document bundles, statements, and submissions as described below, the contents of which were noted.

The Decision and Order

The Tribunal was not satisfied that a relevant offence had been committed during the requisite time. Consequently it had no jurisdiction to make a rent repayment order. It further determined that there should be no order for costs.

Background

1. By an Application received on 21 August 2020 the Applicant ("Ms Stewart") applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under Section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order in respect of rent paid to the Respondents ("Mr and Mrs Spence") as landlords of the property.
2. The Tribunal issued Directions to the parties on 13 November 2020.
3. The bundle of documents supplied by Ms Stewart included copies of bank statements, correspondence, a court order, and photographs as well as her statements of case. Mr and Mrs Spence through their solicitors provided their statements of case and included copies of various correspondence, emails and extracts from legislation.
4. A Full Video Hearing was held on 21 April 2021. In attendance were Ms Stewart who represented herself, and Mrs Spence represented by her solicitor Ms Mansfield.

The Property

5. The Tribunal did not inspect the property, but understands that it is a 4 storey house with 4 bedrooms, 1 with an ensuite, and that it also has a kitchen 2 lounges and a bathroom.

Facts and chronology

6. None of the following matters have been disputed, except where specifically referred to.
7. Mr and Mrs Spence are the freehold owners of the property.

8. Ms Stewart moved into the property in June 2018 agreeing to pay a rental of £360 per month. At that point in time, she was sharing the property with 3 others. Mr and Mrs Spence were abroad.
9. There was no written tenancy agreement.
10. Bank statements show rent totalling £1047 was paid between June 2018 and October 2018. Thereafter no further payments were made until 9 October 2019. It was confirmed that £690 had been paid subsequently.
11. A letter dated 19 December 2018, from solicitors acting for Ms Stewart to Mrs Spence, referred to a “court hearing on 11 October 2018 where an order was made requiring our client to be returned to the property”.
12. Mr and Mrs Spence in March 2019 began court proceedings for repossession of the property and payment of arrears of rent.
13. Following a hearing in the Birkenhead County Court on 8 August 2019, at which both parties were legally represented, District Judge Campbell ordered repossession of the property by 29 August 2019, and made a money judgement in favour of Mr and Mrs Spence for rent arrears of £4061.64 plus statutory interest of £324.94 together with fixed costs of £481.75.
14. Ms Stewart vacated the property on 29 August 2019.
15. There is no dispute between the parties that the property did not have an HMO licence during the tenancy.

Ms Stewart written submissions

16. Ms Stewart stated, “the Respondent did not have an HMO licence which I believe was required due to the property comprising more than 3 storeys, as set out in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) Order 2006”. She included an extract from the Order with her submissions.
17. “The Respondents also failed to have adequate fire exits required for an HMO that size or any fire doors. I was not asked for identification and was not given any formal documents such as “how to rent” or a gas safety certificate. This was my first rental property therefore I was unaware of these things being needed at the time”.
18. “I understood that the money was to be paid into a central account which was then sent to the Respondent by another house member. The Respondents closed the central account which the rent went into and I was subsequently able to pay rent to them. They ignored my correspondence with them trying to pay the rent which is how the rent arrears were accrued”.
19. "During the course of my tenancy the Respondents have illegally evicted me by way of changing the locks and I have suffered relentless harassment.”

20. "I seek repayment of the rent paid between June 2018 to August 2019. I ask that the Tribunal include within this the rent arrears I am currently paying back to the Respondents, as the period of which these arrears are owed falls within the applicable period an HMO licence was required."
21. Ms Stewart provided copies of her bank statements as well as a copy of the County Court Order made on 8 August 2019.
22. Ms Stewart in a supplementary statement, took issue with various points referred to the Respondent's initial statement stating that it was untrue that she had had exclusive use of the property from November 2018.
23. She also referred to returning "home from work on Friday 22 March 2019 to find the Respondents had entered the property and installed internal locks on all internal doors barring the kitchen and my bedroom door and provided keys to those locks to all other tenants except myself. This was another attempt made by the Respondents to harass and further intimidate me whilst I was pregnant. It was only after my solicitor advised we would be seeking another injunction if they did not remove the locks as this was a massive health and safety risk. The only lock removed however was on the communal bathroom door." Ms Stewart provided various photographs showing locks on different doors.
24. She further stated "the Respondents referred to my application to the Tribunal being out of date due to myself being the only tenant in the property from November 2018. This was not the case as outlined above however, I believe that even if this was to be true and I was the only tenant residing in the property. The property was set up and rented as an HMO in the first instance and would remain so whether all rooms were let during the whole of my tenancy. My agreement to rent a room and have access to common areas had not changed. I therefore would argue that the offence of running an unlicensed HMO is a continuing act running from the beginning of my tenancy in June 2018 to the 29 August 2019 when possession was given up, therefore my application submitted on 20 August 2020 was within the 12 month period following the offence.

Mr and Mrs Spence's written submissions

25. Mr and Mrs Spence in their statement of case referred to going travelling and renting out the property to friends. They confirmed "that it is and only ever has been their sole property".
26. They expanded on the timeline of events and referred to the particulars of claim relating to the possession proceedings.
27. They confirmed that Ms Stewart had not been known to them before moving into the property. "House rules were made clear including no drugs, parties or unknown persons to stay. She was also notified that the Respondents would be returning in 12 - 18 months to move back into the house."

28. They stated that Ms Stewart broke all the house rules. As part of their repossession claim they stated “she has regularly brought illegal drugs into the property and/or used illegal drugs in the locality of the property... at least once or twice a week since July 2018 to date... she has regularly allowed visitors and other persons to enter and/or remain at the property and bring illegal drugs into the property....The defendant has regularly caused or allowed or permitted the property to fall into a filthy state and or otherwise to be damaged... The Defendant smokes throughout the property on a daily basis... This is in breach of the express or implied terms of the tenancy. The Defendant holds "rave" style parties at the property. These parties have occurred on every weekend....since July 2018 to date. These parties have involved playing of loud music at an unacceptable level, shouting, the use of foul and abusive language, the possession and taking illegal drugs and screaming and banging noises.... This behaviour has continued into late in the evening and through to the early hours ... other occupants of the property have been acutely affected by the behaviour felt intimidated and threatened and uncomfortable as result of it.... it has been necessary to call the police out on more than one occasion to assist in dealing with abating the severe nuisance and criminal behaviour.”
29. Details of the judgement obtained in August 2019 were confirmed. “The Applicant requested and was awarded an opportunity to pay in instalments in the sum of £60 per month but failed to keep up with payments”.
30. They did not accept “that this was an HMO at the material time” and stated “from the date of the entry of the Applicant on 11 October 2018 she was for a short period living with... Myriam Spence, who then moved out by November 2018 and from that point until eviction, the Applicant had exclusive possession of the property”.
31. They denied any form of intimidation and did not accept “that the Applicant has a valid claim under section 72 of the Housing Act 2004 and that she did not have a valid claim at the time this application was issued and made. This relates both to a potential offence committed in October 2018 as any such claim would be time barred”..
32. Mr and Mrs Spence also applied for a wasted costs order and for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Procedure Rules”) stating that “it is clear that the Applicant has acted unreasonably as she has: attempted to mislead the Tribunal in respect of sums due which have already been set off against the arrears due; failed to make reference to the alleged offence that the claim would relate to as it is clearly 10 months out of time; and has brought this claim in an attempt to avoid paying all remaining sums due from her to the Respondent; and finally the claim will inevitably fail and should never have been brought.”

The Law

33. Since April 2006 it has been a national legal requirement for specified Houses in Multiple Occupation (“HMOs”) meeting certain designated tests to be licensed under part 2 of the Housing Act 2004 (“the 2004 Act”) with a mandatory HMO licence. These included houses with 3 storeys, occupied by 5 or more people, living as 2 or more households containing shared facilities such as a kitchen bathroom or toilet.
34. On 1 October 2018, the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 extended the types of buildings requiring a mandatory HMO licence to include those with less than 3 storeys, occupied by 5 or more people, living as more than 1 household, containing shared facilities.
35. Section 40(3) of the 2016 Act lists those offences which if committed by a landlord entitle the Tribunal to make a rent repayment order.
36. The list, repeated in the Directions, includes the offence under Section 72 (1) of the 2004 Act of controlling or managing an unlicensed HMO. Section 72(5) states that it is a defence that he had a reasonable excuse.
37. Where the offence was committed on or after 6 April 2018, the relevant law concerning rent repayment orders is to be found in Sections 40 – 52 of the 2016 Act.
38. Section 41(2) provides that 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.
39. Section 43 of the 2016 Act provides that the Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that the landlord has committed one of the offences specified in Section 40(3).
40. When the Tribunal decides to make a rent repayment order in favour of a tenant, it must go on to determine the amount of that order in accordance with Section 44.
41. If the order is made on the ground that the landlord has committed the offence of controlling or managing an unlicensed HMO, the amount must relate to rent paid during a period not exceeding 12 months, during which the landlord was committing the offence (section 44(2)).
42. Section 44(3) confirms that the amount that the landlord may be required to repay must not exceed:
 - (a) the rent paid in respect of the period in question, less

- (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.
43. In cases such as this the Tribunal has a discretion in determining the amount, but Section 44(4) states that it 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 any of the specified offences.
44. Rule 13 of the Procedure Rules states that
- “(1) The Tribunal may make an order in respect of costs only –
- (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in of applying for such costs;
 - (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
 - (i) an agricultural land and drainage case
 - (ii) a residential property case, or
 - (iii) a leasehold case;”

The Hearing

45. The hearing was initially delayed (inter-alia) because of connectivity issues.
46. It was explained at the outset, that the Tribunal had some questions to raise on the papers, which it would ask of Ms Stewart and Mrs Spence, after the parties opening introductory submissions, and before proceeding further.
47. The timeline of events was discussed. The description of the property was agreed, as were the rental payments that had been made.
48. The 4 bedrooms in the property were all said to be doubles.
49. It was agreed that when Ms Stewart’s tenancy began in June 2018, she shared the property with 3 other young women, Liz, Rose and Hannah.
50. Rose and Hannah later left the property, and were replaced by Charlotte.
51. When Mrs Spence returned to the property in October 2018, with her husband remaining abroad, Ms Stewart, Charlotte and Liz were the sole other occupants.
52. Mrs Spence evidence was that she then remained in the property but for a few days.

53. Whilst the parties struggled to recollect the precise dates, it was agreed that Liz left without being replaced, and that Charlotte had also moved out by June or July 2019, leaving Ms Stewart then as the sole occupant.
54. Ms Stewart agreed that at no point during her tenancy was there any more than 4 persons, including herself, occupying the property as their only main residence at the same time.
55. Having heard this evidence, the hearing was adjourned to allow the Tribunal to consider the question of jurisdiction.
56. The Tribunal then reconvened and delivered its decision on the substantive issue of whether a rent repayment order could be made as set out below, before thereafter listening to parties' submissions on Mr and Mrs Spence's application for costs under Rule 13 of the Procedure Rules.

The Tribunal's Reasons and Conclusions

Jurisdiction

57. As was explained, the first issue for the Tribunal to address was whether it was satisfied, beyond reasonable doubt, that Mr and Mrs Spence had committed an offence mentioned in Section 40(3) of the 2016 Act, within the period of 12 months, ending on the day on which the application is made.
58. Mr and Mrs Spence have not been convicted of such an offence, but Ms Stewart asserted that they had nevertheless committed the offence, under section 72 (1) of the 2004 Act, of being a person having control of or managing an HMO (namely the property) which was required to be licensed under part 2 of that Act, but was not so licensed.
59. The date on which the Application was made and received was 21 August 2020. Ms Stewart confirmed that it had been posted the day before.
60. Section 41(2) of the 2016 Act specifically confirms, when setting out when a tenant can apply for a rent repayment order, that it is "*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 on the day on which the application is made."
61. Thus the initial questions that the Tribunal had to decide were, firstly was the property let to Ms Stewart, and secondly was it satisfied, beyond reasonable doubt, that during the period from 20/21 August 2019 (i.e. from 12 months before the day of the Application) until the end of Ms Stewart's tenancy, the property was an HMO needing to be licensed. It was only if the answers to those questions were "yes" that the Tribunal would have had jurisdiction and be able to make a rent repayment order, if it decided that it was appropriate.

62. Mr and Mrs Spence's solicitors in their written submissions appeared to assert that the date of the possession order itself, i.e. 8 August 2019, was an important date to consider. The Tribunal did not agree. It is clear from the terms of that order that Ms Stewart was entitled to remain in the property until 29 August 2019. Ms Stewart in her oral evidence confirmed that she vacated the property on 29 August 2019, and this was not disputed.
63. The Tribunal found both that Ms Stewart had a tenancy, and that it continued until 29 August 2019.
64. As a consequence, the Application was made in time, i.e. within 12 months of the end of the tenancy.
65. The Tribunal then carefully considered the evidence as to the occupancy of the property throughout Ms Stewart's tenancy.
66. Her evidence at the hearing, and corroborated by that of Mrs Spence, was that at no time during her tenancy was there an instance when more than 4 people were together occupying the property as their only or main residence. In other words, whilst there may have been times in the earlier part of the tenancy that the property was an HMO, there was no evidence that it was at any time during the tenancy an HMO which needed to be licensed.
67. Ms Stewart was also wrong in her belief that if an offence had been committed at some point in the tenancy (for example, because of there being 5 or more occupants living in the property as their only or main residence) the offence would continue, irrespective of a later reduction to 4 or less occupants.
68. It was clear, from her own admissions, that Mr Stewart was the only occupier of the property during the whole of August 2019, if not also for a period before that.
69. It follows that the property was not an HMO at all in August 2019, and nor could it then have been an HMO which was required to be licensed.
70. The Tribunal also found no compelling evidence of any other relevant offence having been committed during that period.
71. The Tribunal confirmed to the parties at the Hearing that having found no satisfactory evidence of an offence having been committed within 12 months of the Application, there was no jurisdiction for it to make a rent repayment order.
72. Having delivered its decision on the substantive issue, the Tribunal then listened to the parties' submissions on Mr and Mrs Spence's application for costs.
73. Ms Mansfield reiterated various points made in the written submissions, maintaining that Ms Stewart's conduct had been vexatious, and calculated to harass her clients and avoid paying rent arrears which had been established by the prior court order.

74. Ms Stewart explained that her reasons for the application was her belief that the property was an HMO and that it needed to be licensed. She had become aware that there had been changes to the rules relating to the mandatory licensing of HMOs and assumed that the property came within them.

Rule 13 Costs

75. Rule 13 of the Procedure Rules provides that a Tribunal may determine that one party to the proceedings pays the costs incurred by the other party in the limited circumstances set out in that rule, if that party has acted unreasonably in bringing, defending, or conducting those proceedings.
76. The Tribunal gave careful thought to whether such an order should be made against Ms Stewart.
77. In making its decision as to costs the Tribunal has been greatly assisted by a review of the leading Upper Tribunal case of *Willow Court Management Company (1985) Ltd v Alexander and others (2016) UKUT 0290(LC)* whereby Martin Roger QC, Deputy Chamber President of the Upper Tribunal (Lands Chamber) and Siobhan McGrath Chamber President of the Tribunal provided detailed guidance as to how the discretionary power afforded under Rule 13 should be exercised.
78. The case confirms that a finding of “unreasonable conduct” is an essential precondition to the exercise of the Tribunal’s discretion.
79. The first question for the Tribunal to address therefore is has the Applicant acted unreasonably, i.e. acted without any reasonable explanation for the conduct complained of. Previous authorities such as the Court of Appeal in *Ridehalgh v Horsefield (1994) Ch205* make it clear that “unreasonable” conduct includes “conduct which is vexatious, and designed to harass the other side rather than the advance the resolution of the case..... But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result.”
80. *Willow Court* states “only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the analysis”, although qualifies that statement, before continuing “the mere fact of an unjustified dispute over liability has given rise to the proceedings cannot in itself.... be grounds for a finding of unreasonable conduct.”
81. It also makes it clear that the fact that a party acts without legal advice is relevant to the necessary objective assessment of whether the threshold allowing the Tribunal to make an order has been crossed, and agreed with the observation made in *Cancino v Secretary of State for the Home Department (2015) UKFTT 00059 (IAC)* that “stated succinctly, every unrepresented litigate must, on the one hand be permitted appropriate latitude. On the other hand, no unrepresented litigate can be permitted to misuse the process of the Tribunal”.

82. The tribunal did not find that the making of the Application was a misuse of process.
83. It is also clear that there is no presumption in matters before the Tribunal that, as say in the County Court, an unsuccessful applicant should pay the other sides costs. The fact that an application is struck out for want of jurisdiction does not, of itself, mean that conduct is unreasonable.
84. The Tribunal found Ms Mansfield's comments about wasted costs misplaced. As confirmed in section 29(5) of the Tribunal Courts and Enforcement Act 2007, to which she referred, the power to make an order for wasted costs is concerned solely with the conduct of a "legal or other representative" of a party, and not the conduct of the parties themselves. It is a distinct power which should not be confused with the power under Rule 13(1) (b). It follows that a wasted costs order may be made against either a legal representative or a lay representative, but never against the parties themselves. Whilst there were references to Ms Stewart being represented by solicitors in the prior proceedings, there was no evidence of her being represented in the proceedings before the Tribunal.
85. Any costs order that the Tribunal is entitled to make under Rule 13 is restricted to the proceedings before it.
86. Ms Stewart explained that her reasons for the application was her belief that the property was an HMO and that it needed to be licensed. That belief was found to be misplaced, but ignorance of the law is not in itself vexatious. Indeed, it was clear that both parties had not properly concentrated on the current legislation when framing their respective submissions.
87. The threshold as to what is "unreasonable conduct" in this particular context is a high one, and the Tribunal decided that Ms Stewart (who represented herself and who was polite throughout the Hearing) had not crossed it.
88. The Tribunal decided that, in all the circumstances of this case, it would not be appropriate to make an order under Rule 13 of the Procedure Rules.

JM Going
Tribunal Judge
7 May 2021