



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

Case reference : **LON/00AM/HMF/2021/0153**

HMCTS code : **P: CVPREMOTE**

Property : **13b Bayston Road, London N16 7LU**

Applicants : **Stephen Rose
Charlotte Winter**

Representative : **In person**

Respondent : **Maria Bennett**

Representative : **In person**

Tribunal members : **Tribunal Judge I Mohabir
Tribunal Member Appollo Fonka,
MCIEH CEnvH M.Sc**

Date of hearing : **28 April 2022**

Date of decision : **6 May 2022**

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 13b Bayston Road, London N16 7LU (“the property”).
2. The property is described as a First Floor Flat in a converted terrace house comprised of a living room, a bedroom, a bathroom and kitchen.
3. The Applicants were granted an assured shorthold tenancy of the property commencing on 24 July 2015 for a term of 12 months. On expiry of the fixed term, the Applicants held over as statutory monthly periodic tenants. Throughout their occupation of the property, the calendar monthly rent was £1,200. In addition, at the commencement of the tenancy, the Applicants paid a deposit of £1,200, which was protected under the Tenancy Deposit Scheme.
4. The Respondent is the registered proprietor of the property. At all material times, the rent was paid by the Applicants Respondent.
5. On 21 April 2021, the Applicants unilaterally surrendered the tenancy and vacated the property despite no date to do so having been agreed with the Respondent. The Applicants conceded that they did not in fact inform the Respondent that they had surrendered the tenancy on vacating the property. The Respondent asserted that she was not made aware by the Applicants that they had surrendered the tenancy until 3 June 2021.
6. The London Borough of Hackney, in which the property is located, operated a selective licensing scheme that commenced on 1 October 2018 and was subsequently amended on 16 October 2019. It was common ground that the property was not licensed pursuant to the scheme.
7. Subsequently, the Applicant made this application dated 23 June 2021 for a rent repayment order for the period February 2020 to January 2021 during which the property was let as an unlicensed private rented home.

Relevant Law

Requirement for a Licence

8. Under Part 3 of the 2004 Act a Local Authority can designate part or all of their district as subject to selective licensing. The conditions for doing so include low housing demand and anti-social behaviour. Once designated Selective Licensing applies to all privately rented properties within the area and not just HMO’s.
9. In addition, a property must meet the requirement to be licensed under the se-

lective licensing scheme where a local authority operates such a scheme.

10. The Housing Act 2004 Part 2 s.95(1) provides:
(1) A person commits an offence if he is a person having control of or managing an house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

Section 263 of the Act defines a person having control or managing as:

(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.

Making of rent repayment order

11. Section 40(1) of the 2016 Act confers the power on the First-tier Tribunal to make a rent repayment order in relation to specific offences which are listed in a table at section 40(3) of the Act. Relevant to these proceedings are offences described at row 2 (eviction and harassment of occupiers) and 5 (control or management of unlicensed house) of the table.

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) ...
 - (c) ...

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 28 April 2022. Both the Applicants and the Respondent appeared in person.
15. In the application, the Applicants sought a rent repayment order for the 12-month period from February 2020 to January 2021 for the sum of £13,800. Again, it was common ground that the Applicants had only paid a monthly rent of £900 for the months of February and March 2020 because they had unilaterally discounted £300 from the rent for these months as a result of having intermittent heating and hot water. A new boiler had been installed by the Respondent on or about 20 February 2019. The Applicants then sought to amend the application so that the relevant 12-month period was from April 2020 to March 2021.
16. The Tribunal does not allow this amendment for the following reasons. Firstly, the amendment to the application was not made until the actual hearing and was, therefore, too late. Secondly, the financial prejudice to the Respondent was significant, as it would potentially increase the value of the claim to £14,400 and she would in effect have been ‘ambushed’ by the amendment by not having had an opportunity to respond to it. The Tribunal did not consider it proportionate to adjourn the hearing to give the Respondent the opportunity to do so. Therefore, the Applicants’ claim is limited to the 12-month period from February 2020 to January 2021.
17. In relation to the Respondent’s conduct under section 44(4)(a) of the Act, the Applicants alleged that the property had suffered from disrepair throughout their occupation regarding water ingress to the living room ceiling, the fireplace and the presence of mould and damp in the kitchen, bathroom and bedroom. In addition to their oral evidence they relied on photographic evidence of the disrepair. The Respondent accepted that there was minor disrepair to the bath panel, a small area of ‘blown’ plaster in the hallway and a small area of kitchen tiling required some remedial work
18. Put simply, the Respondent’s case was that she was not aware of the requirement for the property to have a selective licence. In any event, she did not accept that the property was in significant disrepair as the Applicants alleged.
19. As a general point, the Tribunal found the Respondent to be a credible witness and accepted her explanation that she genuinely was not aware of the requirement for the property to be licensed and had a low level of culpability. In other words, we did not consider her to be a ‘rogue’ landlord.
20. Based on the evidence before it, the Tribunal made the following findings of fact beyond reasonable doubt:

- (a) that the property was a house and was in the selective licensing area as designated by the London Borough of Hackney , therefore, required to be licensed under section under sections 61(1) and 55 respectively in the Act.
- (b) that the property was not licensed during the Applicants' occupation, but any award is limited to the maximum rent received for the period from February 2020 to January 2021. Therefore, the Tribunal was satisfied that the Respondent had committed an offence under section 72(1) of the Act.
- (c) there was no physical disrepair to the fireplace. The Applicants' case was that 'cracks' in it caused the living room to be cold and draughty. This did not to disrepair per se. In any event, to the extent that it did, the Tribunal accepted the Respondent's evidence that this had not been reported to her and, therefore, any repairing obligation she had was not engaged.
- (d) arguably, the mere presence of mould in the bathroom, kitchen and bedroom did not amount to disrepair in law. There was no evidence before the Tribunal that it was the result of a structural defect in the property. It is likely that the presence of mould was caused by condensation caused by the Applicants' daily living activities and a lack of ventilation. Similarly, there was no evidence of damp in these areas. The photographic evidence provided by the Applicants did not support such a conclusion.
- (e) there was some minor disrepair to the living room ceiling caused by water ingress. However, from the photographic evidence, the water staining appeared to be historic and the disrepair minor in nature. At best, it could be described as being unsightly for want of redecoration. This evidence did not support the Applicants' assertion that the water ingress was continuous until they vacated the property. Instead, the Tribunal accepted the Respondent's evidence that she had replaced the roof in December 2017 and that water ingress occurred on two subsequent occasions following significant rainfall. It took two further investigative visits by a roofer to establish that the cause of the water ingress was an area of render to the front of the property, which was repaired on or about 10 April 2020.

21. The Tribunal was, therefore, satisfied that apart from the requirement for the property to be licensed, it was not in significant disrepair save for the minor disrepair conceded by the Respondent to the living room ceiling, the bath panel and the small area of plaster in the hallway. The Tribunal was also satisfied that these areas of disrepair were not significant and had not materially affected the amenity of the property for the Applicants.

22. In addition, the Tribunal was further satisfied that the Respondent had attended to the replacement of the boiler, the roof and the windows in the property in a during the Applicants occupation of the property. The Tribunal also noted that the Respondent had provided in evidence the electrical safety certificate dated 24 March 2018 and a gas safety certificate dated 12 March 2020. This would tend to support her assertion that she had obtained the relevant certificates during the Applicants' occupation of the property.
23. The Tribunal then turned to assess the quantum of the rent repayment order that should be made against the Second Respondent.
24. 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. It was held in that case 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).
25. This decision was followed by the Upper Tribunal decision in the case of **Williams v Parmar** [2021] UKUT 244 (LC) where the Upper Tribunal held that when considering the amount of a rent repayment order the Tribunal is not restricted to the maximum amount of rent and is not limited to factors listed at section 44(4) of the Act.
26. The Upper Tribunal held that "*there is no presumption in favour of the maximum amount of rent paid during the period*". It was noted that when calculating the amount of a rent repayment order the calculation must relate to the maximum in some way. Although, the amount of the rent repayment order can be "*a proportion of the rent paid, or the rent paid less certain sums, or a combination of both*". Therefore, there is no presumption that the amount paid during the relevant period is the amount of the order subject to the factors referred to in section 44(4) of the Act.
27. The Upper Tribunal further went on to highlight that the Tribunal is not limited to those factors referred to in section 44(4) and that circumstances and seriousness of the offending landlord compromise part of the "*conduct of the landlord*" and ought to be considered. The Upper Tribunal considered that the Tribunal had taken a very narrow approach of section 44(4)(a) by stating "*meritorious conduct of the landlord may justify a deduction from the starting point*". It concluded that the Tribunal may in appropriate cases order a lower than maximum amount if the landlord's conduct was relatively low in the "*scale of seriousness, by reason of mitigating circumstances or otherwise*".
28. The Upper Tribunal went on to lower the amount of the rent repayment orders made by the Tribunal by applying a reduction of 20% and 10% on the basis that whilst the landlord did not have any relevant previous convictions, she was also a professional landlord who had failed to explain why a licence had not been applied for and the condition of the property had serious deficiencies.

29. The Upper Tribunal also confirmed that in cases where the landlord is a professional landlord, and the premises has serious deficiencies more substantial reductions would be inappropriate even if the landlord did not have any previous convictions.
30. This decision highlights that there is no presumption that rent repayment orders will be for maximum rent, and that while the full rent was in some sense still the “starting point” that did not mean that the maximum rent was the default. The amount of the rent repayment order needs to be considered in conjunction with section 44(4) factors and the Tribunal is not limited to the factors mentioned within section 44(4). This means that even if a landlord is guilty of an offence, if their offence is not a particularly serious one, they will expect to be ordered to repay less than the full rent paid during the relevant period.
31. The financial circumstances of the Respondent are unknown. As the Tribunal understands it, the Respondent has not been convicted of any offence. Therefore, the only section 44(4) consideration by the Tribunal was conduct.
32. As stated earlier, the Tribunal did not consider the Respondent to be a rogue landlord. Her failure to obtain a licence for the house was inadvertent and she, therefore, bore a low level of culpability. Of course, this does not provide her with a complete defence to liability under the Act. As a landlord, she is obliged to ensure that she complies with relevant regulatory requirements. Save for her omission to obtain a licence, the Respondent appears to have attended to her other obligations as a landlord including any repairs notified of by the Applicants within a reasonable period of time.
33. Accordingly, taking these mitigating considerations into account, the Tribunal made a rent repayment order in favour of the Applicant in the total sum of £6,900, which represents 50% of the rent paid by the Applicants. The total amount of the rent repayment order is payable by the Respondent within 14 days of this decision being issued to the parties.
34. In addition, the Respondent is ordered to reimburse the Applicants the fees of £150 paid to the Tribunal to have the application issued and heard on the basis that the application has only succeeded in part. This sum is also to be paid by the Respondent within 14 days of this decision being issued to the parties.

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).