FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UM/HMF/2019/0004
Property	**:**	12 Moorholme, Woking, Surrey GU22 7QZ
Applicants	**:**	Gergely Podmaniczki, Nandor Forgo, Dora Berki, Arpad Berki, Norbert Kocsis
Type of Application	**:**	Rent Repayment Order: .41 Housing and Planning Act 2016
Respondent	**:**	Pervez Akhtar
Representative	**:**	Mr R Cifonelli of counsel (instructed by JS Law Partnership)
Tribunal Members	**:**	Judge M Loveday Mr P D Turner-Powell FRICS Ms T Wong
Date of hearing/venue	**:**	13 September 2019, Havant Justice Centre
Date of decision	**:**	23 October 2019

DECISION

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Introduction

1. This is an application for a Rent Repayment Order under s.41 Housing and Planning Act 2016 ("the 2016 Act"). The matter relates to a tenancy of a property at 12 Moorholme, Woking, Surrey GU22 7QZ. The Applicants are former occupiers, and the Respondent is the landlord.

The offence

2. Section 40(3) of the 2016 Act provides that Chapter 4 applies to certain offences "*committed by a landlord in relation to housing in England let by the landlord*". These include an offence under section 72(1) of the Housing Act 2004 in relation to the control or management of an unlicensed HMO.

3. Section 41 of the 2016 Act provides that:

   "*(1) A tenant … 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."

4. Section 42 of the 2016 Act provides that:

   "*(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).*"

5. Section 55(2) of the Housing Act 2004 ("the 2004 Act") provides for the licensing of HMOs. Section 72(1) of the 2004 Act provides that:

   "(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.
   …
   (5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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), or
   (b) for permitting the person to occupy the house, or
   (c) for failing to comply with the condition,
   as the case may be."

6. By Art.4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018, an HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it-

   (a) is occupied by five or more persons;

   (b) is occupied by persons living in two or more separate households; and

   And it meets the standard test under section 254(2) of the 2004 Act.

The premises

6. Moorholme is a small estate in the centre of Woking, largely (if not entirely) comprising several 3-storey blocks containing flats and maisonettes. The Tribunal did not inspect the property, but there was no dispute about the layout of the property during the relevant period. It comprises a split-level maisonette as follows:
   a. Ground Floor: Street access and cloakroom/WC.
   b. First floor: A kitchen and two rooms. The larger of the two rooms has been used in the past as a lounge/diner. The smaller was described at one stage of the proceedings as a "box room".
   c. Second floor: Three rooms and bathroom/WC. Again, one of the rooms (to the rear) was described during the proceedings as "small".

The Applicants' case

7. The Applicants set out their case in written statements and gave oral evidence at the hearing. They were cross-examined by the Respondent's counsel.

   The First Applicant

8. Mr Gergely Podmaniczki presented the case for the Applicants. He relied on a witness statement dated 17 May 2019 and a joint statement dated 25 July 2019. The Tribunal was also provided with a copy of a signed statement under s.27 Criminal Justice Act 1967 dated 30 November 2018.

9. In his evidence, Mr Podmaniczki described the occupation of the property from time to time as follows:
   a. He and four others went into occupation on 15 April 2016. The others were (his then partner) Ms Monika Fazekas, Ms Dora Berki, Mr Nandor Forgo and Mr Balazs Fazekas. In his oral evidence, Mr Podmaniczki explained that he and Ms Fazekas occupied the rear double bedroom on the 2nd Floor, whilst Mr Forgo and Ms Berki occupied the front double bedroom on the 2nd Floor. Mr Fazekas (Monika's brother) occupied the box room on the first floor. At that stage, there were therefore five people living at the property in three households.

b. In June 2016, Mr Arpad Berki moved into the box room on the First Floor. At that stage there were then six people occupying the property in four households.
c. In November 2016, Mr Fazekas moved out. There were then five people occupying the property in three households.
d. In January 2017, Ms Fazekas also moved out. There were then four people occupying, but still in three households.
e. In May 2017, Mr Norbert Kocsis moved into the box room previously occupied by Mr Fazekas. There were then five people occupying the property in four households. They are the five persons listed in the application. They moved out in November 2018.

10. In his statement of 17 May 2019, Mr Podmaniczki stated that prior to moving into the property, he had been living with Ms Fazekas and her brother in another of the Respondent's properties at Elm Street, Woking. The Respondent wanted to renovate that property and offered them 12 Moorholme instead. Mr Podmaniczki stated that he asked whether Ms Berki and Mr Forgo could move in too, "which he agreed to". He informed the Respondent about the change of occupants "when it occurred by telephone". In cross-examination, counsel pressed Mr Podmaniczki for evidence to support these statements. Mr Podmaniczki suggested they had been "talking about it on the phone" or by a WhatsApp message. He accepted he could not say when any telephone call took place, because it was a long time ago. He could not remember any of the details of what was said. He conceded that on the first occasion he may well have told the Respondent that "other people" were "going to move in", rather than being specific about names. The Respondent had simply replied "that's fine". He did not think he had kept any WhatsApp messages and had not tried to retrieve them

11. Mr Podmaniczki produced a copy of an Assured Shorthold Tenancy Agreement dated 15 April 2016 for a period of 1 year to 14 April 2017. The agreement was made between the Respondent as landlord and Mr Podmaniczki, Ms Fazekas and Mr Fazekas as tenants. The tenancy provided for a rent of £1,400 per calendar month. Para 4 of Section A to the tenancy provided that only these named tenants "will be allowed to live there".

12. Mr Podmaniczki stated that the other households gave him their rent money and he paid the entire rent month's rent to the Respondent. He produced bank statements confirming monthly payments of £1,400 to "Mustafa Homes". In January 2017, the payments increased to £1,475 per month. The Respondent knew the payments were made on behalf of all the occupiers. He was asked about this by counsel and Mr Podmaniczki accepted that although the money was collected from the other occupiers, only he dealt with the Respondent in relation to rent.

13. Mr Podmaniczki further stated that the Respondent was aware that the property was being occupied by all the Applicants because (i) they were in contact with him regarding any necessary repairs (ii) the Respondent

came to the property and (iii) he provided references for them, where they were named individually.

14. Counsel cross-examined about the suggestion the Respondent had visited the property. Mr Podmaniczki stated there had been issues with the washing machine and the roof. The Respondent attended the propoerty on both occasions when all the occupiers were there. He visited every room and asked who was living in each room. Then, when they moved out, the Respondent saw everyone when they were cleaning the property. On the occasion with the washing machine, counsel put to Mr Podmaniczki the suggestion that only one person was present who told him there had been a flood. Mr Podmaniczki responded that he did not remember that, "but the main thing was [the Respondent] knew who was living in the property when he came to do the washing machine". There were probably other occasions as well, but he could not remember them. As to the references, Mr Podmaniczki stated that he probably saw them at the house, but he did not remember. Personally, he had not asked the Respondent for a reference, because he did not need one. However, the Respondent had given written references for Mr Forgo, Ms Berki and Mr Berki.

15. Mr Podmaniczki relied on a letter from Woking Borough Council dated 17 July 2019 stating that as the Respondent did not have an HMO Licence for the property between 1 November 2017 and 1 November 2018. Counsel accepted there was no HMO Licence in place at any material time.

16. Mr Podmaniczki sought repayment of £4,227.50 for his share of the rents paid to the Respondent during the relevant time.

The Second Applicant

17. Mr Forgo relied on a signed statement under s.9 Criminal Justice Act 1967 dated 30 November 2018, which incorporated an addendum signed by both him and Ms Berki. He also relied on the Applicants' joint statement dated 25 July 2019.

18. The addendum confirmed that Mr Forgo and Ms Berki moved into the property on 15 April 2016. Prior to that, Mr Podmaniczki, Ms Fazekas and Mr Fazekas had rented a house owned by the Respondent at Elm Street, Woking. The Respondent had offered the property to them, and since Mr Forgo and Ms Berki were also looking for somewhere to live, the group "were talking about that it would be good to move together". Mr Podmaniczki asked the Respondent "if it would be fine if 5 of us plus a cat and [Ms Fazekas's] guinea pig [could] move into the property and the answer was yes". Mr Podmaniczki told them that the Respondent was happy about the cat.

19. Mr Forgo also confirmed that he and Ms Berki paid Mr Podmaniczki £250 per month (£500 altogether). He confirmed the dates of occupation of Mr Berki, Mr Fazekas, Ms Fazekas and Mr Kocsis. Rent was paid

to Mr Podmaniczki who forwarded it to the Respondent on the 15th day of each month.

20. The addendum dealt with several occasions when the Respondent had dealings with the property:
    a. It referred to an occasion when the property was without hot water for 2 weeks. Mr Podmaniczki called up the Respondent. When "the engineers came and fixed the new boiler", they made a hole in the wall, which led to a dispute with the Respondent.
    b. There was a separate incident when the washing machine broke down. The Respondent "brought one" which he had acquired from a charity shop "and he met with us". The machine was mouldy, and the Applicants bought a new one, leaving the second-hand one in the garage.
    c. The appendix stated that in June 2018, Ms Berki texted the Respondent because she was looking for a property for her sister and her partner. Ms Berki mentioned [to the Respondent] that she was one of his tenants and asked if he had a one bedroom or studio to rent. The Respondent said he did not. No copy of the text was produced.
    d. The Respondent gave Mr Forgo and Ms Berki references when they moved out as they needed landlord references for the letting agency. No copy of the reference was produced.
    e. On the day they moved out, the Respondent came to the property when it was being cleaned by all five Applicants. There was a dispute about the standard of cleaning and the return of the tenancy deposit.

21. Mr Forgo was cross-examined by counsel and asked questions by the Tribunal. He accepted that the statements had been compiled with the help of the Local Housing Authority. He also accepted he had not been named in the tenancy agreement. He had not contacted the Respondent directly (apart from the text message above) but had instead spoken to Mr Podmaniczki. He was not present when the conversation took place between Mr Podmaniczki and the Respondent at the start of the tenancy. When he and Ms Berki moved out, they asked Mr Podmaniczki for a reference. Although the Respondent initially refused to give a reference, he eventually did so. Mr Forgo did not have a copy of the reference and did not think he had ever seen it.

The Respondent's case

22. Mr Akhtar referred to a statement dated 19 August 2019 and gave oral evidence at the hearing.

23. The Respondent stated that the property was "let via the tenancy to four persons constituting two households" and it was not an HMO. When he entered into the tenancy agreement on 15 June 2016, he was advised that Mr Podmaniczki and Ms Fazekas were a couple. He was also advised that Mr Fazekas would eventually have his girlfriend moving into the property to create a second household. When he was made aware of this, he

agreed. He stated that “they would make me aware when this would take place” and he agreed, “because this would keep the tenancy level at four persons constituting two households”. He accepted the basic account that Mr Podmaniczki and Ms Fazekas had lived at another of his properties at Woodland, Elm Road in Woking, which he wanted to renovate and that it was agreed they would move to this propoerty. At the time, he had “clearly stated to him that there will be no more than four persons allowed to live at the property to which he agreed”. He was assured this would not be a problem, and that the tenants would adhere to this. He had never agreed to allow another two persons to live at the property – and this would have been a breach of the agreement. There was no amendment of the tenancy agreement, and no additional rent was paid. He had had no dealings with the other Applicants in respect of rent.

24. Mr Akhtar stated that he only became aware that additional persons at the property when he instructed a new letting agent after he understood Mr Podmaniczki intended to move out. Mr Akhtar gave evidence about rental values and other matters which, for present purposes, are not material to the issues which the Tribunal must determine. However, he dealt with the issue of references in this way. The Respondent stated that Mr Podmaniczki had left people in the property who were unknown to him, in breach of the tenancy agreement. When Mr Akhtar confronted Mr Podmaniczki with this situation, he was told that these people were leaving and “in order to allow a smooth transition to provide them with references [so] they can find new properties”. He was initially unwilling to assist with references. But the letting agent “advised me to provide the references as she [had] tenants ready to move into the property”. He did, therefore, provide the references “having understood that they were in fact the people providing Gergely with the rental payments”. Mr Akhtar stated that he was conscious of his responsibilities for HMOs, having faced this situation at another of his properties, where two couples had sub-let to 4 or more persons.

25. As to the evidence of contacts after the letting, the Respondent stated that he understood texts had been sent to him enquiring about available properties. He was not personally aware of the name of every tenant at all his 13 properties. He therefore responded to say he did not have any available property. He had also been aware that the property had had a problem with the water supply, and he organised an engineer who attended the next day. The plumber attended a few days after ordering a new diverter valve.

26. Mr Akhtar answered questions put by Mr Podmaniczki and by the Tribunal. He accepted his statement had been prepared by a solicitor and that he had read it. He read and wrote English but was “not great at it”. As far as the boiler incident was concerned, he stated that basically he had had a call about the hot water not working. The British Gas insurance was no good for this, so he got a private engineer to get involved. He ordered a diverter valve, which led to a delay. The Respondent stated he had only had one conversation with Mr Podmaniczki ‘face to face’. This was outside one of his properties in Woodlands, where he lived. Mr

Podmaniczki was correct about the discussion about moving to the property. But the Respondent denied there had been a discussion about other people moving in. He was sensitive about the issue, because he had had "problems" with a case like this one. Judgment had been given against him and he had not been aware it was an HMO. Therefore, there was no way that he would have allowed any kind of open-ended arrangement.

27. Mr Akhtar was asked about the references. He had received a text from Mr Podmaniczki to the effect that the letting agency wanted references. But one cannot give references for people you don't know. The agent suggested that the occupiers would stay in the property until he provided the references. He therefore gave oral references to the letting agent over the phone. It was put to Mr Akhtar that it was an odd thing to give a reference on this basis. But he stated that he acted on the advice of the letting agent.

28. Mr Podmaniczki asked about Ms Berki's text message enquiring about the availability of other properties. Why would he reply if he didn't know she was living there? Mr Akhtar said that he didn't know any names. He had only heard the names of Ms Fazekas and Mr Fazekas after this case began.

29. The Respondent agreed he had visited on two occasions. But he did not see "all these people" until the end of the tenancy when he was checking the carpets. It had not been obvious that the property was occupied by more than 3-4 people. When there was a problem with the roof, he had gone into only one of the second-floor bedrooms. He had not attended for the boiler; it was the engineer who did so. On the second occasion, he had attended to deal with the washing machine. But he had only gone into the kitchen and there was only one person there. At the end of the tenancy, he had visited, and they were all standing around. Mr Akhtar visited every room on that occasion, but the rooms were empty.

30. In response to questions from the Tribunal, Mr Akhtar stated that the tenancy agreement was completed at his home. The Respondent's son filled out the tenancy agreement for him and he then signed it. Ms Fazekas and Mr Fazekas were in the room at the time. He had never been informed about the fourth person occupying the property and therefore never got around to amending para 4 of the tenancy agreement.

Submissions

31. Counsel accepted that during the period from 1 November 2017 to 1 November 2018:
    a. The property was required to be licensed under the 2004 Act and the 2018 Order.
    b. The property did not have a licence.
    c. The Respondent had control of the property.

    The sole issue was whether, under s.72(5)(a) of the 2004 Act, the Respondent has a "reasonable excuse" for controlling or managing the HMO without a licence. He stressed that the test under s.42(1) of the

2016 Act was whether the Tribunal was satisfied about this beyond reasonable doubt.

32. The reasonable excuse defence was that Mr Akhtar was not aware that the property was not occupied by five or more persons in two or more separate households. Counsel relied on the following:
    a. The terms of the tenancy agreement, which specifically prohibited more than three named individuals to occupy.
    b. That rents were paid through Mr Podmaniczki. All the Respondent could see from his bank statements was that one of the permitted occupiers was paying the rent.
    c. There was a divergence of evidence about what took place on the visits during the term. However, it was not even clear when the visits happened.
    d. There was the evidence there had been texts and WhatsApp messages. Again, there was a divergence of evidence on the point, but none of these had been produced.
    e. At the end of the term, it was agreed the Respondent had been to the property and seen several individuals. But by that stage, the property was empty.
    f. The Respondent explained the references, which he said were given verbally to the letting agents.

    It was submitted one could not be sure that the Respondent was aware that there were more than four people occupying the property in more than two households.

33. Counsel also addressed the Tribunal about the amount of any rent repayment order, but for the reasons given below, it is unnecessary to set these out here.

34. Mr Podmaniczki agreed that the only issue was whether the Respondent had a "reasonable excuse" for controlling or managing the HMO without a licence. He referred to the evidence given, which established that Mr Akhtar understood more than four people occupied the property in more than two households.

The Tribunal's Findings of Fact

35. The Tribunal will first comment on the oral evidence in general. It does not appear that English was the first language of any of the three witnesses who gave oral evidence.
    a. There were numerous occasions in Mr Podmaniczki's evidence when he realistically admitted he could not remember the details of events which had occurred sometimes over 3 years before the hearing. The main difficulty with his evidence about these events was a lack of detail about the dates and times of events, and that there was no documentary evidence at all to support his allegations. This was the case even where documents might have been readily been thought to be available – such as copies of phone records, WhatsApp messages and written references.

b. The same general comment can be made about Mr Forgo, although he was perhaps less tentative than Mr Podmaniczki. But his evidence suffered from the fact that the main written statement in the appendix was prepared jointly with Ms Berki and covered only some of the issues.
c. As to Mr Akhtar, by his own admission his written and read English were "not great", and this is consistent with his son having been asked to complete the tenancy agreement. The Respondent's oral evidence presented confidently, although some of his answers lacked any real conviction (particularly his explanation about the references). Again, his oral evidence lacked any detail of dates etc., and lacked any supporting documentation.

Overall, the Tribunal therefore approaches the evidence of all three witnesses with a degree of caution.

36. On the issues of fact which bear upon its decision, the Tribunal finds as follows:
    a. The Respondent was aware of the configuration of the propoerty at the date of the letting. It effectively included three double bedrooms and two single rooms. It was of enough size to accommodate up to eight persons – or six with a living room.
    b. The Respondent, Mr Podmaniczki, Ms Fazekas and Mr Fazekas each signed the tenancy agreement on 15 April 2016. The Tribunal finds that none of the parties considered the contents (and clause 4 or Part A) with any degree of care. Their English skills did not lend themselves to the task of detailed consideration of a technical legal document. This particularly applied to Mr Akhtar, who had to ask his son to complete the agreement.
    c. As to the allegation that Mr Podmaniczki discussed with the Respondent the possibility that 5 people (plus pets) might move in at the start of the tenancy, none of the witnesses was able to give a date or time. The alleged conversation happened some three years before the hearing. For the reasons given above, clause 4 of the tenancy does not provide any corroboration. The Tribunal is not satisfied so as to be sure that the conversation took place as alleged by Mr Podmaniczki.
    d. It is accepted the Respondent visited the property twice during the term. The sole issue is whether he visited every room in the house. On this issue, the Tribunal prefers Mr Akhtar's evidence. The detail given by Mr Podmaniczki about the alleged inspections is not something which previously appeared in any statement. Moreover, there is no suggestion Mr Akhtar took any action as a result of the inspection. If he had seen 5, 6 or 7 people in the property, the Tribunal considers he would have acted – not least (as he himself suggested) by trying to increase the rent.
    e. The Tribunal finds Ms Berki did send a text message enquiring about the availability of other properties, and that the Respondent replied to it.
    f. The Tribunal prefers the Respondent's evidence that when he visited at the end of the tenancy, the rooms were empty. After all,

that is the usual situation with an 'end of tenancy' visit by a landlord, particularly when the departing occupiers are cleaning a property (as they were in this case). But in any event, an inspection at this stage was too late to put the Respondent on notice that he was maintaining an HMO.

g. The Tribunal finds that at the end of the tenancy, Mr Akhtar did give a reference to a letting agent in relation to Mr Forgo and Ms Berki. It is unlikely that this was oral, since an oral reference to an agent would be unusual. But the Tribunal cannot be sure without a copy. No evidence was given by any witness about the contents of the reference.

Conclusions

37. It follows from the above that the material evidence is limited to the layout of the premises, the text message and the references. The layout of the premises is not conclusive that the Respondent knew the property was an HMO. It indicated there was the possibility the property might become an HMO, not that it was and HMO. As to the text message and the references, it is disappointing (and perhaps surprising) that the Tribunal was not provided with a copy of either. Absent a copy of the text message, the Tribunal finds the Respondent's explanation about it to be plausible: the message may not have clearly put Mr Akhtar on notice that there was an additional occupier of the premises. As to the references, the Respondent's explanation may have been somewhat tenuous, but there was no evidence to rebut that explanation.

38. Taking everything into account, the Tribunal cannot therefore be sure the Respondent knew more than four persons occupied the property at any time or that they formed more than two households. This meets the threshold for a reasonable excuse defence under s.72(5)(a) of the 2004 Act. The application for a Rent Repayment Order is dismissed.

Judge Mark Loveday
23 October 2019

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.