



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

Case Reference : **LON/00AY/HMK/2019/0032**

Property : **89 Churchmore Road, London SW16
5XA**

Applicant : **Ms Eva Broeckelmann**

Representative : **In person**

Respondent : **Ms Florentina Zloteanu**

Representative : **Mr Robert Mander**

Type of Application : **Application for a Rent Repayment Order
by the Tenant Sections 40, 41, 43 & 44
Housing and Planning Act 2016**

Tribunal Members : **Judge Pittaway
Mr M Cairns MCIEH**

**Date and Venue of
Hearing** : **11 July 2019 at
10 Alfred Place, London WC1E 7LR**

Date of Decision : **12 September 2019**

DECISION

Decision of the Tribunal

The Tribunal does not make a Rent Repayment Order against the respondent as it is not satisfied beyond reasonable doubt that the respondent committed an offence under section 72(1) of the Housing Act 2004, namely being a person in control of or managing an unlicensed house in multiple occupation between 30 June 2018 and 8 October 2018.

The Application

1. On 8 April 2019 the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“the **2016 Act**”) for a Rent Repayment Order (“**RRO**”) in respect of 89 Churchmore Road London SW16 5XA (‘the **Property**’).
2. The Property is described in the application as a house on three floors comprising 5 ensuite bedrooms and 1 studio, which has a small kitchenette and its own bathroom. The shared areas and facilities include a kitchen, WC, hallway, backyard and laundry facilities. It is a shared house with one single entrance.
3. The application has been brought by Ms Broeckelmann who is the tenant of the studio under a tenancy agreement dated 21 April 2018 for a term commencing on that date and ending on 21 April 2019.

Directions

4. On 17 April 2019 the Tribunal issued directions. These set out the issues which the Tribunal would need to consider, namely whether to make a RRO and for what amount. The respondent was advised to seek independent legal advice.
5. By 17 May 2019 the respondent was directed to file a bundle of documents including:
 - (i) A full statement of reasons for opposing the application, including any defence to the alleged offence and response to any grounds advanced by the applicant, and dealing with the issues identified above;
 - (ii) A copy of the tenancy agreement;
 - (iii) Evidence of the amount of rent received in the period (less any universal credit/housing benefit paid to any person), with details of the occupancy by the tenant on a weekly/monthly basis;
 - (iv) A copy of all correspondence relating to any application for a licence and any licence that has now been granted;
 - (v) The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/summary of their evidence, stating that it is true;

- (vi) A statement as to any circumstances that could justify a reduction in the maximum amount of any rent repayment order;
 - (vii) Evidence of any outgoings, such as utility bills, paid by the landlord for the let property;
 - (viii) Any other documents to be relied upon at the hearing.
6. By 31 May 2019 the applicant was directed to file a bundle of documents including
- (i) Details of the alleged offence;
 - (ii) A copy of her tenancy agreement;
 - (iii) A calculation of the rent paid in the applicable period;
 - (iv) Any expanded statement of case, with a response to the respondent's case;
 - (v) The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/summary of their evidence, stating that it is true; and
 - (vi) Any other documents to be relied upon at the hearing.
7. The directions to be complied with by the applicant noted that the tribunal would need to be satisfied **beyond reasonable doubt** that an offence had been committed by the respondent.
8. Further directions issued on 10 June 2019 directed that by 21 June the respondent provide
- (i) An expanded statement of case explaining who occupied the rooms between 1 April 2018 and 31 March 2019 together with details of the rent paid by each;
 - (ii) Copies of the letting agreements for all the occupants
 - (iii) Documentary evidence to support the assertion that the application for an HMO Licence was made on 8 October 2018;
 - (iv) Any other documents that she wishes to rely on in her contention that the property was not an HMO that was required to be licenced until after 26 March 2019;
 - (v) Any witness statements upon which she intends to rely. The Applicants have filed a bundle of documents including (i) details from Camden, as the local housing authority, of the alleged offence; (ii) copies of their tenancy agreements; (iii) a table setting out the rent paid; and (iv) short witness statements.

9. The further directions did not order disclosure of the respondent's bank statements but contemplated that the respondent might decide to provide these to counter the applicant's evidence regarding the occupancy of the property. In the absence of bank statements the directions stated that its decision would be made on the basis of the evidence before it.
10. The further directions also gave the applicant the ability to provide by 4 July 2019 a supplementary statement of case in reply and witness statements upon which she wished to rely.

The Hearing

11. The respondent was represented by Mr Robert Mander, the respondent's partner.
12. The applicant acted for herself. Ms M Chowdhury of the Personal Support Unit of the Royal Courts of Justice attended with her at the hearing.

The Evidence

13. The tribunal had before it at the hearing the applicant's bundle, received by it on 31 May 2019; the respondent's substitute bundle dated 16 June 2019, prepared following the further directions of 10 June 2019 (in substitution for the respondent's original bundle dated 14 May 2019); and the applicant's witness statement and supplementary statement of case received by the tribunal on 3 July 2019.
14. The tribunal heard evidence from Ms Broeckelmann, Mr Mander and Ms Zioteanu, and submissions from Ms Broeckelmann and Mr Mander.
15. The documents, evidence and submissions are referred to below in the tribunal's reasons for its determination.

Agreed matters

16. Before the receipt of the applicant's supplemental statement of case it appeared to the tribunal that there was an issue as to the date on which the respondent had made her application to the local housing authority for a HMO ("House in Multiple Occupation") licence. However the respondent's expanded statement of case included a copy of the online application for a licence dated 6 October 2018 (but which Mr Mander confirmed was only submitted on 8 October 2018); and in the applicant's supplementary statement of case of 3 July 2019 she confirmed that the period during which an offence may have been committed ended on 8 October 2018.

The issue

17. Accordingly, the sole issue before the tribunal to determine was whether the property had been an unlicensed HMO during the period from 30 June 2018 to 8 October 2018, as claimed by the applicant. If it had been the applicant was entitled to seek a rent repayment order.
18. Ms Broeckelmann asserted that five or more individuals were in occupation of the property during that period; that there were at least two households; that the property comprised three storeys; that the property included shared amenities and therefore fell within the mandatory HMO licensing criteria under the Act. Further these individuals were occupying the property as their only or main residence.
19. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the issue as follows.

The tribunal's determination and reasons.

20. It is accepted by the parties that if the property was occupied by five persons as their only or main residence it would be a HMO that requires mandatory licensing.
21. It is further accepted by both parties that the front ground floor room on the left had been occupied by Ms Annie Wood from July 2018, and that the ground floor room at the back had been occupied by Ms Natasha White since July 2018. Mr Madalin Ciuguzan was in occupation of Room 5 (on the first floor) in and from April 2018 (his tenancy agreement refers to him taking occupation in February 2018) and Ms Broeckelmann had occupied the second floor studio since April 2018.
22. Ms Broeckelmann's submission is that at and after 30 June 2018 the property was occupied by more than five individuals; by reason either of Mr Edison Lopes having remained in occupation after 30 June 2018; or by reason of Mr Mander occupying the ground floor room front right as his residence.
23. Ms Broeckelmann drew the tribunal attention to inconsistencies between the respondent's original statement and her substituted statement. The respondent admitted there were errors in the original, which she had corrected. The tribunal do not consider these inconsistencies as evidence of a deliberate attempt to mislead the tribunal.

Mr Lopes' occupation of Room 4

24. Ms Broeckelmann's evidence in respect of Mr Lopes' occupation of the room after June 2018 was based on her recollection that he had remained after June and that he had only left sometime later, which she estimated to have been in September or October 2018. She stated that as the tenant of the room above his she had heard him in the room; she had seen him on the balcony of the room; his bicycle had been chained outside the property or left in its hall. She further recollected speaking to Ms White about him, which could only have been after Ms White moved in at the beginning of July.
25. Ms Broeckelmann submitted that Mr Lopes' tenancy agreement was for a term to 1 May 2019 and that the respondent had provided no written evidence that the agreement had been terminated. No Notice to Quit (as contemplated by paragraph 30 of the agreement) had been produced, nor evidence of written amendment or modification of the agreement (as contemplated by paragraph 38 of the agreement) nor evidence of the landlord having exercised her right to terminate because the tenant was in breach of his obligations (as contemplated by paragraph 53 (b) of the agreement). Further the respondent had not provided any bank statements as evidence of when Mr Lopes stopped paying rent. She invited the tribunal to make an adverse inference from the non-provision of bank statements.
26. Ms Zioteanu gave evidence that Mr Lopes had asked to terminate his tenancy because of the excessive noise coming from the the applicant's room above his and that his tenancy had been terminated by mutual oral agreement at the end of June 2018 and that the room was only relet to Mr Munyni on 13 October 2018, after the application had been made for the HMO licence. She was adamant that he had left at the end of June. If there had been someone on the balcony after that it may have been Mr Ciuguzan, who had once asked if he could smoke there. She did not believe Mr Lopes' bicycle had been there after June. In response to questions from Ms Broeckelmann she and Mr Mander explained that Mr Lopes had paid his deposit and rent in cash; therefore they had no bank statement that would corroborate when he had stopped paying rent.
27. Ms Broeckelmann referred the tribunal to the term of Mr Lopes tenancy, which was for a term from 1 May 2018 to 1 May 2019 and to various provisions in the lease which would have required written agreement between the landlord and the tenant if the term was going to be varied or brought to an early end (paragraphs 30, 38 and 55b.) She submitted that the absence of any such written evidence suggested that the tenancy had continued beyond June 2018. As to the various paragraphs to which Ms Broeckelmann referred the tribunal, Mr Mander submitted that in each case the obligation to comply was not mandatory; the landlord might serve the notice, etc. but was not obliged to do so. The tenancy had not continued until its contractual term, as evidenced by Mr Munyni moving into the room in October 2018. This was evidence that the agreement had been terminated before then, and it is the respondent's case that this termination occurred in June 2018.

28. The tribunal consider that Ms Broeckelmann genuinely believes that Mr Lopes remained in occupation of the room after June 2018. However, section 43(1) states

“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 had been convicted).”

29. Accordingly the tribunal needs to be satisfied (a) by the applicant and (b) beyond reasonable doubt that an offence had been committed by the respondent. It is not for the respondent to disprove the applicant’s assertion. In the absence of concrete evidence of Mr Lopes’ continued occupation of the room the tribunal do not consider that Ms Broeckelmann has met the high standard of proof that this test requires as to Mr Lopes remaining in the room after June 2018.

Mr Mander’s occupation of the room on ground floor front right

30. It was Ms Broeckelmann’s submission that Mr Mander occupied the ground floor room front right as his only or main residence. In support of this in her witness statement she refers to the room containing a made up bed and nightstand; that he did laundry at the property; his presence in the room all days of the week at various times; his practising yoga in the back garden, wearing recreational clothing at the property, receiving letters there and his car being parked there night and day.
31. Mr Mander gave evidence that he had occupied the ground floor room front right as an office, until about a month before the hearing, following the destruction of his normal office in a fire. The papers in the bundle confirmed that this had occurred in March 2018.
32. In response to the questions put to him by Ms Broeckelmann as to his occupation of the room, Mr Mander explained to the tribunal that the bed in the room was a built-in fixture; that his work was such that he did not keep regular office hours; that he did three and a half hour’s yoga a day (which meant that he did it at his office as well as at home). He explained to the tribunal that following registration as proprietor of the property he had received unsolicited letters addressed to him there, but that otherwise the only correspondence received by him there was from Virgin Media. He included in the bundle copies of a letter from HM Revenue & Customs and bank statements addressed to him at 9 Hospital Bridge Road TW2 5UL, which he stated is his main residence, where he lives with the respondent. As to leaving his car at the property he explained that it is an electric car and that there is an exterior plug there that he uses to charge it.
33. While understanding why Ms Broeckelmann might have thought that Mr Mander was occupying the room as a residence, the tribunal is satisfied, on the basis of the evidence before it, that the room at the property is not Mr Mander’s

only or main residence. It accepts his evidence that he used the room as his temporary office rather than as a residence.

The date upon which the property became subject to the requirement of mandatory licensing

34. The tribunal accept the respondent's submission that the property only required a mandatory licence when Mr Munyni occupied Room 4 from 13 October. Prior to that date the respondent had submitted an application for an HMO licence so no offence was committed by her, and the tribunal therefore does not make a rent repayment order.

The law

35. The relevant law is set out in the Appendix to this decision.

Judge Pittaway
12 September 2019

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.

Appendix of Relevant Legislation

Housing Act 2004

56 Designation of areas subject to additional licensing

- (1) A local housing authority may designate either -
- (a) the area of their district, or
 - (b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

61 Requirement for HMOs to be licensed

- (1) Every HMO to which this Part applies must be licensed under this Part
- (a) a temporary exemption notice is in force in relation to it under section 62, or
 - (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

63 Applications for licences

- (1) An application for a licence must be made to the local housing authority.

72 Offences in relation to licensing of HMOs

- (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-
- (b) an application for a licence had been duly made in respect of the house under section 63

254 Meaning of “house in multiple occupation”

- (1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if-
- (a) it meets the conditions in subsection (2) (“the standard test”);
 - (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
 - (c) it meets the conditions in subsection (4) (“the converted building test”);

- (d) an HMO declaration is in force in respect of it under section 255; or
 - (e) it is a converted block of flats to which section 257 applies.
- (2) 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.

Housing and Planning Act 2016

40 Introduction and key definitions

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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.
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
1	Criminal Law Act 1977	section 6(1)	violence for securing entry

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

- (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.
- (3) A local housing authority may apply for a rent repayment order only if –
 - (a) the offence relates to housing in the authority’s area, and
 - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of a rent repayment order

- (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 had 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 with –
 - (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

- (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 this table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	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 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,
- (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.