



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

**Case reference:** MAN/00CA/HSD/2019/0005

**Property:** 83 Manchester Road Southport PR9 9BN

**Applicant:** Sefton Metropolitan Borough Council

**Respondent:** Ms Michelle Edith Iris Ball

**Type of Application:** Application for a rent repayment order by a Local Housing Authority under Section 41 of the Housing and Planning Act 2016

**Tribunal Members:** Judge J.M.Going  
P.E.Mountain

**Date of Deliberations:** 22<sup>nd</sup> January 2020

**Date of Decision:** 29<sup>th</sup> January 2020

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**DECISION**

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## **The Decision and Order**

**Ms Ball is ordered to repay Housing Benefit/Universal Credit of £13,293.27 to the Council.**

### **Background**

1. By an Application dated 6<sup>th</sup> August 2019 the Applicant (“the Council”) 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 Housing Benefit and Universal Credit paid by the Council to the Respondent (“Ms Ball”) as the landlord of the property (“the Application”).

2. The Tribunal on 18<sup>th</sup> September 2019 issued Directions to the parties stating that the matter would be dealt with on the basis of the written submissions and documentary evidence without the need for an oral hearing, unless either party requested the opportunity to make oral representations. Neither party requested an oral hearing and the Tribunal convened on 22<sup>nd</sup> January 2020 to consider the Application on the basis of the written representations of the parties.

3. The Tribunal did not inspect the Property, known as the Cresta Hotel, but understands that it has three occupied storeys plus an attic room, with Ms Ball, at the relevant times, living in a self-contained flat in the basement. The tenants had access to shared bathroom facilities and a communal kitchen as well as kitchen facilities in their rooms.

### **Facts**

4. On 15<sup>th</sup> May 2019 at the Sefton Magistrates Court Ms Ball was found guilty of the offence, under Sections 72(1) and (6) of the Housing Act 2004 (“the 2004 Act”) of, on 15<sup>th</sup> August 2018, having control or management of a House in Multiple Occupation (“HMO”) (namely the property) which was required to be licensed under part 2 of the 2004 Act but which was not so licensed (“the offence”). Ms Ball was fined £5000 and ordered to pay costs of £1466.42, and a surcharge to fund victim services of £170.

5. The Council issued a Notice of intended proceedings dated 27<sup>th</sup> of June 2019 informing Ms Ball that it was proposing to make the Application.

6. The Council has applied to recover the sum of £13,293.27 paid to Ms Ball in respect of Housing Benefit and Universal Credit payments for the 12 months up to 15<sup>th</sup> August 2018.

7. The Council in its written evidence referred to the offence as having subsisted from 16<sup>th</sup> August 2017 to 15<sup>th</sup> August 2018 and provided documentary evidence of its payments of Housing Benefit and Universal Credit paid during that period.

## Submissions

8. Ms Ball in her Witness Statement referred to owning the property from December 2003 until September 2018, initially with her former partner. She described the use of the property, and the circumstances under which it was inspected by the Housing Authority in August 2018. She confirmed that she had agreed to sell the property to her brother in or around June 2017 and with completion in September 2018, or sooner if he could, because she was struggling running the hotel business on her own and getting into more debt. She provided various copy invoices and summarised these on a spreadsheet to show that her outgoings relating to the property for the 13 month period from the beginning of August 2017 to the end of August 2018 amounted to approximately £14,800. She confirmed that throughout the process of selling the property she had been under her doctor's care for depression and taking medication. She explained that she had not registered the property as an HMO because she had believed that a hotel did not need to be registered, and because the council housing department had been sending her tenants and issued her with a landlord number. She concluded her statement by saying "I can only state when I housed guests on benefits it was helping vulnerable people who would otherwise have been homeless at a cost of less than £10 per night per person. I liaised and spoke with the housing department on a weekly basis and at no time was an HMO licence ever mentioned".

9. Ms Ball's solicitors when responding to the Notice of intended proceedings in July 2019 stated "1. Miss Ball's failure to register a HMO was based on a misunderstanding by her of the regulations and was not a deliberate attempt by her to avoid the necessity...2. The tenants she took on were actually sent to her by the housing centre.... These were genuinely tenants who had been unable to obtain accommodation themselves... Miss Ball was sympathetic to their plight and was providing accommodation to people who would otherwise would potentially have been, or had been, "rough sleepers"... 4. Miss Ball is currently unemployed and, she has no income, a rent repayment order would cause her exceptional hardship bearing in mind the fine that was set against her at the magistrates court. Had the council made the court aware that they would be seeking the rent repayment order, the argument could have been made to reduce the level of financial penalty".

10. Ms Ball also submitted an undated letter received in the Tribunal office on 17<sup>th</sup> January 2019 in which she took issue with the Council's understanding of the use of the attic bedroom, and stated "in my defence, my firm belief was I did not need a licence unless I rented out three levels".

11. The Council in its evidence confirmed that it had been prompted to inspect the property in August 2018 following complaints from tenants that there were many defects at the premises, including pigeons within the roof space. The inspection identified the property as an occupied three-storey HMO requiring to be licensed under the 2004 Act. Having checked its records that there had been no licence application, the Council's Housing Team manager, after discussion with colleagues and the Council's legal services, took the decision that it was in the public interest to prosecute. Ms Ball pleaded guilty at the

Magistrates court hearing. The Council confirmed that the need for mandatory licensing had been introduced by the 2004 Act, was well publicised, and that information about mandatory licensing could easily be accessed on its website. It also confirmed that, from evidence on its Housing Benefit database, Ms Ball had been in receipt of direct rent payments in respect of Housing Benefit for tenants at the property since at least 2010, and pointed out that any rent repayment order would of necessity be capped at 12 months. It also pointed out that Section 46 of the 2016 Act confirms, that where there has been a conviction of a relevant offence, the Authority must consider applying for a rent repayment order. Reference was also made to Guidance issued by the Secretary of State and its specific references to the need for rent repayment orders to punish the offender, have a real economic impact on the offender, deter the offender from repeating the offence, deter others from committing similar offences, remove any financial benefit from the offender obtained as a result of committing the offence, and protect the public purse.

12. The Council having regard to the layout of the premises confirmed that Ms Ball's flat was accessed from the common parts i.e. the hall on the ground floor. It also pointed out that the council tax payments (amounting to £1186) referred to by Ms Ball as an outgoing related solely to her flat and were nothing to do with the tenants, and that throughout the period in question the rest of the building was subject to business rates, where Small Business Rate Relief had been awarded meaning that there was no money to pay from 2010 until the sale date in 2018. The Council also clarified various information from different documentary records as regards the number of occupants during the period in question, before confirming that it was satisfied that there were a minimum of five residents, including Ms Ball, for the whole of the period from 16 August 2017 to 15 August 2018.

## **Law**

13. HMOs are defined in Sections 254 – 260 of the 2004 Act.

14. A building is an HMO if it meets the conditions set out in various designated tests.

15. The converted building test is met if the building or part of the building

- is a converted building; (meaning at least one of the units of accommodation have been created since the building was constructed)
- it consists of one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also includes such flat or flats);
- the living accommodation is occupied by persons who do not form a single household;
- living accommodation is occupied by those persons as their only or main residence or they are treated as occupying it as such;
- their accommodation of the living accommodation constitutes the only use of that accommodation and

- rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation (Section 254(4))
16. Mandatory licensing of an HMO applied at the operative time, if
    - (a) the HMO or any part of it comprised three storeys or more;
    - (b) it was occupied by five or more persons; and
    - (c) it was occupied by persons living in two or more single households.
 (Paragraph 3 of the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 SI 2006 No 371)
  17. 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.
  18. The list, repeated in the Directions, includes the offence under Section 72 (1) of the 2004 Act of controlling or managing an unlicensed HMO.
  19. 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.
  20. Section 42 confirms that before applying for a rent repayment order a local housing Authority must give the landlord a Notice of intended proceedings which must (a) inform the landlord that the Authority is proposing to apply for a rent repayment order and explain why, (b) state the amount that the Authority seeks to recover, and (c) invite the landlord to make representations within the period specified in the Notice of not less than 28 days (“the Notice period”) and the Authority must consider any representations made during the Notice period. The Authority must wait until the Notice period has ended before applying for a rent repayment order and a Notice of intended proceedings may not be given more than 12 months after the day on which the landlord committed the offence to which it relates.
  21. 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).
  22. When the Tribunal decides to make a rent repayment order in favour of a local Housing Authority, it must go on to determine the amount of that order in accordance with Section 45. 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 Universal Credit (which Section 51 confirms includes Housing Benefit) paid in respect of the period of 12 months ending with the date of the offence. Section 45(3) confirms that the amount that the landlord may be required to repay... must not exceed the amount of Universal Credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period.

23. Section 46 confirms that the amount of an order made in favour of a local housing Authority, where the landlord has been convicted of the offence, “is to be the maximum that the Tribunal has power to order in accordance with Section... 45” but with it provided in subsection (5) that “nothing in this Section requires the payment of any amount that, by reason of exceptional circumstances, the Tribunal considers it would be unreasonable to require the landlord to pay”.

### **The Tribunal’s Reasons and Conclusions**

24. The first issue for the Tribunal to address is whether it is satisfied, beyond reasonable doubt, that Ms Ball has committed an offence mentioned in Section 40(3) of the 2016 Act.

25. The Tribunal is satisfied, beyond reasonable doubt, from the evidence provided by both parties, and the copies of the court records, both that Ms Ball committed and has been convicted of the offence.

26. The Tribunal is also satisfied that the Council complied with all the necessary procedural requirements relating to the Notice of intended proceedings and the making of the Application.

27. Because the Council applied for a rent repayment order within 12 months of the commission of the offence on 15<sup>th</sup> August 2018, the Tribunal is clear that it does have jurisdiction to make an order.

28. The Tribunal (particularly having regard to the objectives behind the statutory provisions i.e. to enable a penalty in the form of a civil sanction to be imposed in addition to any penalty payable for the criminal offence of operating an unlicensed HMO, and to help prevent a landlord from profiting from renting properties illegally) is satisfied that it is appropriate to make a rent repayment order in the circumstances of this case.

29. As the Upper Tribunal confirmed in the case of London Borough of Newham v Harris 2017 UKUT 0264 LC “it will be a very rare case where the Tribunal does decide to exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of so doing include the obligation to repay rent or housing benefit the Tribunal should be reluctant to refuse to make an order”.

30. Having decided that an order should be made, the Tribunal then went on to consider carefully the amount of rent which had to be repaid.

31. As a consequence of Section 46 of the 2016 Act the Tribunal must order the maximum amount potentially repayable unless it is satisfied that, by reason of exceptional circumstances, it would be unreasonable to require repayment of some or all of the relevant sum. These statutory provisions (in contrast to those which apply where there has not been a conviction) confirm that it is only in exceptional circumstances that the Tribunal can order anything other than the full amount paid by the Local Authority in rent during the relevant 12 month period whilst the offence was being committed. Parliament has clearly decreed

as a matter of public policy that Housing Benefit/Universal Credit should be repaid where a landlord has failed to gain the necessary HMO licence.

32. There is little guidance as to what might constitute exceptional circumstances but the Tribunal is of the opinion that the ordinary meaning of the word “exceptional” inevitably sets a very high threshold, and that personal circumstances such as the tenant’s financial position will not normally meet the test. It is significant that terms of Section 46 when contrasted with those of Section 44 show that it is only when there has not been a conviction that the Tribunal must have regard to the conduct of the parties and the landlord’s financial circumstances.

33. As pointed out by the Council, when replying to the representations made on behalf of Ms Ball, the Guidance given by the Secretary of State (which the Housing Authority has to have regard to under Section 41 (4) of the 2016 Act) refers, in instances where there has not been a conviction, to the Authority needing to take into account “(a) Punishment of the offender. Rent repayment orders should have a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities... (b) deter the offender from repeating the offence... (c) dissuade others from committing similar offences... (d) remove any financial benefit the offender may have obtained as a result of committing the offence. This is an important element of rent repayment orders: the landlord is forced repay rent and thereby loses much, if not all, of the benefit that accrue to them by not complying with their responsibilities”.

34. The Tribunal has carefully considered all of the evidence, and in particular the comments made in mitigation both in Ms Ball’s witness statement and her solicitor’s response to the Notice of intended proceedings, but has nonetheless concluded that the circumstances of the case do not amount to an instance of such exceptional circumstances as would allow it to make an order of anything other than the maximum amount.

35. Sections 45(2) of the 2016 Act limits the amounts of Housing Benefit to be repaid to the period of 12 months ending with the date of the offence of intended proceedings (in this case to the period from 16 August 2017 to 15 August 2018).

36. The Tribunal is satisfied, on the evidence before it, that there were at least five residents, including Ms Ball, residing in the property throughout the whole of the 12 month period, and as a consequence Ms Ball was committing the offence for the whole of that period.

37. The Tribunal is also satisfied that all of the Housing Benefit/Universal Credit referred to in the Notice of intended proceedings (i.e. 13,293.27) was paid to Ms Ball in respect of that 12 months, and must therefore be repaid in full.

**Tribunal Judge J Going**  
**22 January 2020**