FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0121**
HMCTS	**:**	**V: Video Hearing Services**
Property	**:**	**Flat 206 Harley House, 11 Frances Wharf, London E14 7FP**
Applicant	**:**	**Mr Nathan Cummiskey**
Representative	**:**	**Ms Olivia Gatfield (Solicitor's Clerk – Express Solicitors Ltd.)**
Respondent	**:**	**Mrs Balbir Sobti**
Representative	**:**	**In person**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Antony Parkinson MRICS**
Date and Venue of Hearing	**:**	**1 October 2021 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**6 October 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal has had regard to the papers listed at [2] below).

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the Respondent in the sum of £3,550 which is to be paid by 27 October 2021.

2. The Tribunal determines that the First Respondent shall also pay the Applicants £300 by 27 October 2021 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. By an application, dated 8 November 2020, the Applicant seeks a Rent Repayment Order ("RRO") against the Respondent pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to the accommodation which he occupied at Flat 206 Harley House, 11 Frances Wharf, London E14 7FP ("the Flat"). The Applicant seeks a RRO of £5,170.88 in respect of the rent which he paid between 12 October 2019 and 12 May 2020.

2. On 19 May 2021, the Tribunal gave Directions pursuant to which:

(i) The Applicant has filed Bundle of Documents (50 pages), references to which will be prefixed by "A.___"). This included (a) a copy of the tenancy agreement; (b) proof of the rent that he paid (a total of £9,900); and (c) witness statements from the Applicant and Miss Minna Hii. This also included emails from the London Borough of Tower Hamlets which confirm that the borough had introduced a Selective Licensing Scheme on 1 April 2019. Under this scheme, any HMO required a licence when they are occupied by three or more persons, comprising two or more households.

(ii) The Respondent has filed a Bundle of Documents (49 pages), references to which will be prefixed by "R.___"). This included a witness statement from the Respondent. The Respondent included the outgoings for which she was responsible in respect of the Flat including an annual service charge bill of £6,550.

(iii) In Response, the Applicant has served a second witness statement together with a statement from Richie Wong.

The Hearing

3. The Applicant, Mr Nathan Cummiskey, was represented by Ms Olivia Gatfield, a Clerk with Express Solicitors Ltd. The Applicant gave evidence. He is a professional boxer and personal trainer. Neither Ms Hii nor Mr Wong were available to give evidence, despite the Note in the Directions that any witness should be available to give evidence. In the event, little in their evidence was in dispute. However, the Tribunal gives less weight to their evidence than would have been the position had they attended to be tested by cross-examination.

4. The Respondent, Mrs Balbir Sobti was represented by her husband, Mr Prabhjit Singh Sobti. Mrs Sobti gave evidence. She lives in Luton. She works for the East London NHS Trust.

5. The hearing was conducted virtually, using the HMCTS Video Hearing Service. There were some problems of connectivity, but we stopped the hearing when any party dropped out. We are satisfied that both parties had an adequate opportunity to present their cases.

The Background

6. The Flat at Flat 206 Harley House, 11 Frances Wharf, London E14 7FP is a three bedroom flat in a purpose built block of flats which was constructed in about 2013. It is situated at the south end of Burdett Road by Limehouse Cut. The master bedroom has an ensuite bathroom. There is also a family bathroom. There is a separate living room. The block has a concierge service. There is a shed for bicycles on the ground floor.

7. On 7 March 2013, Mr Jasjit Singh, the Respondent's son, acquired the leasehold interest in the Flat for £350k. He is a banker. He has worked overseas in Hong Kong and currently in Singapore.

8. Jasjit Singh rented a flat to Mr Richie Wong who occupied the Flat between September 2013 and 20 June 2021. Mr Wong has provided the Tribunal with a tenancy agreement dated 22 September 2015. It purports to be a "House Share Licence", the landlord reserving the right to move the licensee to another room. This was no more than a sham agreement which Jasjit Singh had downloaded from the internet. The substance and reality of the agreement was to grant Mr Wong exclusive possession of one bedroom at a rent of £850 per month, inclusive of outgoings, for a term of 12 months. Mr Wong had shared use of the living room, kitchen and bathroom. Initially, Jasjit Singh was also occupying the Flat. However, in 2014/5, he moved to work in Hong Kong.

9. In October 2019, Mrs Sobti granted Mr Cummiskey a tenancy of the master bedroom at a rent of £1,100 per month for a term of 12 months from 12 October 2019. The written agreement also purports to be a "House

Share Licence" which is similar to the agreement granted to Mr Wong. The Tribunal is satisfied that the substance and reality was to grant a tenancy. Mr Cummiskey had shared use of the kitchen, living room and family bathroom. Mr Cummiskey was living in Wimbledon at the time and saw the Flat advertised on the "SpareRoom" website. He had an urgent need to move and initially described the room as "immaculate" (see R.34).

10. Mrs Sobti suggested that the tenancy excluded use of the kitchen. The licence agreement makes no reference to this exclusion. We are satisfied that Mr Cummiskey was granted the right to use the kitchen and that he regularly used it. On occasions, all the occupants ate together. On occasions, Mr Cummiskey ate out with friends.

11. On 23 September 2019, Mr Sobti had been required to pay a holding deposit of £400 which was somewhat higher than that permitted by the Tenant Fees Act 2019. On 7 October, he paid a further sum of £1,800. The written agreement provided for rent to be paid monthly in advance. It expressly stated that no deposit had been paid. The precise nature of the additional month's rent of £1,100 paid by the tenant is not entirely clear. If it was a deposit, it should have been paid into a Rent Deposit Scheme. However, this is not material to the issues that we are asked to determine.

12. Some minor problems arose, but the Tribunal does not consider these to be significant. Neither did the parties at the time. Initially, Mr Cummiskey kept his bicycle in the hallway. He moved it to the bicycle shed when provided with a key. The Respondent suggests that some damage was caused to the decorations. However, this was only raised after the Applicant had left the Flat. The bed was broken and was replaced by the landlord. We reject Mrs Sobti's suggestion that this was broken by Mr Cummiskey. Mrs Sobti agreed to provide new curtains. The text messages dated December 2019, which Mr Cummiskey exhibits to his second witness confirms that the relationship between the parties was cordial.

13. On 21 December 2019, Ms Hii moved into occupation of the third bedroom, paying a rent of £850 per month. She also signed a sham "House Share Licence", which was signed aby Jasjit Sobti, as landlord. The tenancy was for a term of six months.

14. Mrs Sobti suggested that Ms Hii had been introduced by Mr Cummiskey and by the Concierge at Harley House and that she had only agreed to permit her to stay as a favour for a limited period. Mr Cummiskey denied this and we accept his evidence on this point. Upon Ms Hii moving into occupation of the third bedroom, the Flat required a licence under the Selected Licencing Scheme. We are satisfied that Mrs Sobti's evidence is no more than an attempt to justify her failure to obtain a licence.

15. In March 2020, the first Covid-19 national lock-down was imposed. Mr Cummiskey lost his job and returned to live with his parents in Newcastle. He gave two months' notice that he wished to leave. He vacated the Flat on

12 May 2020. Mrs Singh was willing to accept his surrender of the tenancy. She requested Mr Cummiskey's bank details and repaid him the additional one months' rent of £1,100 which he had paid. It is apparent from the text messages that Mr Cummiskey exhibits to his second witness statement that there was no ill will between the parties.

16. Thereafter, the position of the parties became more entrenched. Mr Cummiskey obtained legal advice that the additional rent of £1,100 was a deposit and should have been paid into a Rent Deposit Scheme. On 7 August 2020 (at R.35), Ms McKay sent a pre-action letter on his behalf. In the event, no action was taken to recover the penalty of three times the deposit. Mr Cummiskey also learnt that the Flat was an HMO which should have been licenced from 21 December 2019. On 12 October 2020 (at R.43), his Solicitor sent a pre-action letter seeking a RRO of £5,170.88 for the period 2 December 2019 to 12 May 2020.

The Housing and Planning Act 2016 ("the 2016 Act")

17. Section 40 of the 2016 Act provides:

> "(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has 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."

18. Section 40(3) tabulates seven offences. These include the offence of "control or management of an unlicenced HMO" under section 72(1) of the Housing Act 2004 ("the 2004 Act").

19. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

20. Section 43 provides for the making of RROs:

> "(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)."

21. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides:

> "(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.

22. Section 44(4) provides:

> "(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."

23. Section 56 is the definition section. This provides that "tenancy" includes a licence.

The Housing Act 2004 ("the 2004 Act")

24. Part 2 of the 2004 Act relates to the licensing of HMOs. By section 56, a local housing authority ("LHA") may designate an area in their district to be subject to additional licencing.

25. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide:

> "(1) A person commits an offence if he is a person having control of or managing a house 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) ..... it is a defence that he had a reasonable excuse (a) for having control of or management of the house in circumstances mentioned in subsection (1)...."

26. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that 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."

27. On 1 April 2019, the London Borough of Tower Hamlets ("Tower Hamlets") introduced an Additional Licencing Scheme as a result of which all HMOs in this part of the borough require a licence provided that they are occupied by three or more persons, comprising of two or more households. The relevant designation had been made on 31 October 2018.

28. Section 263 defines the concepts of "person having control" and "person managing":

> "(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."

Our Determination

29. Our starting point is section 263 of the 2004 Act (see [28] above). We are satisfied that the Respondent falls within the statutory definitions of the "person having control" of the Flat. Mrs Sobti received rent from Mr Cummiskey whether on her own account or on behalf of her son, Jasjit. She was the person named as landlord on Mr Cummiskey's tenancy agreement. Strictly, this would have been a tenancy by estoppel, as there is no evidence that Jasjit had granted his mother any legal interest in the Flat.

30. It would have been open for the Applicant also to have sought the RRO against Jasjit Singh as the "person managing" the Flat. He holds the relevant leasehold interest. The rent was paid into a bank account in his name. He would be liable as an undisclosed principal. The Court of Appeal decision in *Rakusen v Jepsen* [2021] EWCA Civ 1150 has no relevance to this principle.

31. The Tribunal is satisfied beyond reasonable doubt that the Respondent committed an offence under section 72(1) of the 2004 Act. We are satisfied that:

(i) The Flat was an HMO falling within the "standard test" as defined by section 254(2) of the 2004 Act which required a licence (see [26] above):

> (a) it consisted of three units of living accommodation not consisting of self-contained flats;
>
> (b) the living accommodation was occupied by persons who did not form a single household;
>
> (c) the living accommodation was occupied by the tenants as their only or main residence;
>
> (d) their occupation of the living accommodation constituted the only use of the accommodation;
>
> (e) rents were payable in respect of the living accommodation; and
>
> (f) the households who occupied the living accommodation shared the kitchen, bathroom and toilet.

(ii) From 21 December 2019, the Flat required a licence under Tower Hamlet's Additional Licencing Scheme as it was an HMO which was occupied by three people in more than two households (see [27] above).

(iii) The Respondent did not apply for a licence as required by section 61 of the 2004 Act. This is an offence under section 72(1).

(iv) The offence was committed between 21 December 2019 and 12 May 2020. An offence would have ceased when the Respondent applied for a licence on 4 November 2020.

32. The Respondent seemed to accept that the Flat needed to be licenced under Tower Hamlet's Additional Licencing Scheme and that it was not so licenced. However, at times she seemed to suggest that she had a reasonable excuse for not licencing the Flat. It is for a landlord to satisfy the Tribunal on a balance of probabilities that she has such a reasonable excuse (see *IR Management Services Limited v Salford City Council* [2020] UKUT 81 (LC)).

33. In her witness statement, Mrs Sobti states that she was informed by the Environmental Health Department that she did not need a licence. On 4 November 2020, she applied for a licence despite advice from the Department that no licence was required (see [7] of her witness statement at R.3). A licence has now been granted. Mrs Sobti failed to give any adequate evidence as to when she sought this advice, from whom this advice was sought, and the detail of the advice that was given. She accepted that ignorance of the law was no defence. We are therefore satisfied that no defence of reasonable excuse has been established.

34. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. Section 44 provides that the

period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit. We are satisfied that the Applicant was not in receipt of any state benefits. He paid his rent from his earnings.

35. The Applicant seeks a RRO in the sum of £5,170.88 for the period 21 December 2019 and 12 May 2020. This is based on the rent of £1,100 per month which equates to £36.16 per day for 143 days.

36. Section 44 of the 2016 Act, requires the Tribunal to take the following matters into account:

(i) The conduct of the landlord;

(ii) The conduct of the tenant;

(iii) The financial circumstances of the landlord;

(iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.

We have had regard to the recent decisions of the Upper Tribunal and, in particular, the decision of the Deputy Chamber President, Martin Rodger QC, in *Ficcara v James* [2021] UKUT 38 (LC).

37. Whilst the Applicant has made some complaints of disrepair, the Respondent now claims that the Applicant caused damage totalling £854.98. She now blames the Applicant for damaging the decorations, damaging the bed, staining the carpet and failing to return the keys. None of these issues were raised at the time. As we have noted above, there seemed to have been a good relationship between the parties. We accept that there was some modest disrepair. The Applicant may have caused minor damage to the decorations. However, these matters cancel each other out.

38. We are satisfied that there are three matters which we should take into account. First, the Respondent is not a professional landlord. However, we are not impressed by the licence agreement which Mrs Sobti and her son found on the internet. This was a sham device to conceal the real relationship of landlord and tenant. This has no impact on the application for a RRO as the legislation applies equally to licences as to tenancies (see [23] above). The Sobtis would have been better advised to have searched the government website on "Renting out your Property" and had due regard to their responsibilities as landlord to provide their tenants with a copy of the "How to Rent" guide, an EPC certificate and obtained the requisite gas and electricity checks. A search of the internet would also

have highlighted the circumstances in which an HMO licence would be required. A Tribunal has limited sympathy for a landlord who fails to carry out these basic checks.

39. Secondly, the Respondent is entitled to be given credit for the responsible approach which she adopted when the Covid-19 pandemic was declared. The Applicant lost his job and returned to Newcastle. Ms Sobti allowed him to surrender his tenancy before the contractual end date on 11 October 2020.

40. Thirdly, we are satisfied that we should have some regard to the sums that the landlord has paid which would otherwise be passed to the tenant. In paragraph 10 of her statement, Mrs Softi specifies the bills which she has paid in respect of the Flat, namely annual charges of £6,549.72 pa for service charges, £1,560 for electricity, £250 for ground rent, £623.88 for internet, £273.04 for water charges, £1,701.85 for council tax, and £154 for a television licence. She computes that at £30.40 per day. We note that these relate to the whole Flat and only some 33% would relate to the Applicant's tenancy.

41. The Tribunal has had regard to the Upper Tribunal decision in *Vadamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38. We should not adopt an arithmetical approach of adding up the landlord's expenses and deducting them from the rent. We should also give limited weight to the costs that the landlord would incur in any event in carrying out his obligations as landlord. However, we should give greater weight to any expenses relate to utilities such as electricity, the television and council tax.

42. Taking all these factors into account, we make a RRO in the sum of £3,550, namely 70% of the rent paid by the Applicant between 21 December 2019 and 12 May 2020. This is £24.80 per day over this 143 day period, compared with the sum of £36.16 per day sought by the Applicant.

43. We are also satisfied that the Respondent should refund to the Applicant the tribunal fees of £300 which he has paid in connection with this application. He has succeeded in his application.

Judge Robert Latham
6 October 2021

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.