



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : **CHI/00HB/HMF/2020/0022**

Property : **First Floor Flat,
44 Cromwell Road,
Bristol BS6 5HB**

Applicants : **Camille Francoise Monique Lemerancier
Tenika Jade Cock
Lydia Catherine Adkinson**

Respondent : **Helen Elaine Higgins**

Application : **Application by tenants for a Rent Repayment
Order following an alleged offence committed by the
Respondent for having control or management of an
unlicensed House in Multiple Occupation (“HMO”)
– Section 43 of the Housing and Planning Act 2016
 (“the 2016
Act”)**

**Date application
received** : **24th July 2020**

Tribunal : **Bruce Edgington (lawyer chair)
Paul Smith FRICS
Michael Jenkinson**

Date & place of hearing: **2nd December 2020 as a video hearing
from Havant Justice Centre in view of
Covid pandemic restrictions**

DECISION

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1. The Tribunal makes a Rent Repayment Order in the sum of £3,000.00 i.e. £1,000.00 should be paid to each Applicant by 4.00 pm on the 8th January 2021.
2. The Tribunal also determines that the Respondent pay an additional £300.00 to Ms. Lemerancier for herself and as agent for the other 2 Applicants as reimbursement for fees paid to the Tribunal.

Reasons

Introduction

3. Rent Repayments Orders (“RROs”) require landlords who have broken certain laws to repay rent paid either by tenants or by local authorities and are intended to act as a deterrent to prevent offending landlords profiting from breaking such laws.
4. The orders were originally made pursuant to the **Housing Act 2004** (“the 2004 Act”) but this application is made under the later provisions contained in the 2016 Act. Section 41(1) of the 2016 Act says that “*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*”.
5. Section 40 sets out the offences and prefaces the definition by saying “*an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord*”. One of those offences described is under section 72(1) of the 2004 Act i.e. “*control or management of unlicensed HMO*” and this is the offence relied upon by these Applicants.
6. The Tribunal made a directions order on the 1st September 2020 identifying from paragraph 9 of the application form that the joint claim is for £1,275 per month from 9th October 2019 until 21st February 2020 making a total of £5,694. The order also timetabled the case to a hearing on 2nd December 2020 which has been by way of a video hearing because of the Covid pandemic.
7. When this hearing was arranged, the Tribunal case worker kindly put together an e-bundle of all the documents which had been submitted by the parties with numbered pages. Any page numbers mentioned in this decision are from that bundle. Further lengthy submissions and documents were then submitted including some on the morning of the hearing. The parties should know that all of these documents and submissions have been carefully considered by the Tribunal members.

Jurisdiction

8. Section 41 of the 2016 Act says that the Tribunal has jurisdiction if “*the offence was committed in the period of 12 months ending with the day on which the application is made*”. The Tribunal has to be satisfied that an offence has been committed using the criminal standard of proof i.e. beyond a reasonable doubt.
9. Section 44 of the 2016 Act says that the RRO can “*relate to rent paid during....a period, not exceeding 12 months, during which the landlord was committing the offence*”. Section 72(4)(b) of the 2004 Act provides a defence to any prosecution namely that an application has been made to the relevant local authority for an HMO licence.
10. Ms. Higgins helpfully accepted that she knew about the designation of Cromwell Road as being within an additional selective HMO licensing area; that she knew that the property should have had a licence and that she needed to apply for one by 8th July 2019

although she would not be prosecuted if she applied by 9th October; that she is a qualified accountant and had professional property managers acting for her at the time, although Messrs. Andrews no longer act for her; that Messrs. Andrews contacted her about getting a licence in February 2020 and, as a result, she contacted Bristol City Council and that she paid an application fee when she applied for her licence on 21st February 2020.

The Hearing

11. Those attending the hearing were all 3 Applicants, the Respondent and Ms. Cara Guthrie, an Environmental Health Officer from Bristol City Council. The Tribunal case officer introduced the attendees and then assisted everyone by giving technical advice as to how the hearing would proceed. The Tribunal chair then introduced himself and the Tribunal members.
12. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases and, finally, he would ask the other Tribunal members to ask any questions they had. That is in fact how the hearing was dealt with although, at the end, he did ask any party if they had anything else to say. They said that they did not.
13. It was confirmed and agreed between the parties that the property was occupied by 3 people at least from 8th July 2019 until the 29th September 2019. One tenant then left and Ms. Cock joined Ms. Lemercier and Ms. Adkinson.
14. Ms. Higgins then gave evidence about 2 main subjects i.e. her assertion that she had made an application of an HMO licence on time and her financial situation which she had said that she wanted taken into consideration.
15. She confirmed that she “believed” that she had made her application ahead of the 8th July 2019 and had told her managing agents, Messrs. Andrews, at the time. She confirmed also that she had no copy of the application. She said that she was reasonably sure that the application had been ‘on line’. In her written evidence at page 164 in the e-bundle, she says that she “reasonably believed” that she paid an application fee. She said that she contacted the council in February 2020 following a communication from Messrs. Andrews reminding her of the need for a licence.
16. As far as her financial situation was concerned, she said that she is a qualified accountant but works as a waitress for 2 days a week earning £3/400 per month. She is not married and owns the house she lives in plus the house in which the property is situated which has 2 flats. The first floor flat has been let for £1,500 per month since 19th October 2020 and the ground floor flat is being refurbished and will be let shortly. She said that she and her family do most of such work.
17. She said that she has no mortgages but she then said that she has a loan relating to the first floor flat for which she pays £800 per month. She has no savings and no overdraft.

18. Cara Guthrie gave evidence. She said that she was contacted by the Respondent on the 17th February 2020 about the obtaining of an HMO licence for the property. She said that Ms. Higgins made no mention of a previous application having been made and she believed that the reason given by Ms. Higgins for her contacting them was because Messrs. Andrews had reminded her that she needed a licence. In view of the importance of this issue, her council has a system whereby they can check to see whether a previous application has been lodged on line but which has not been finalised for some reason.
19. In view of Ms. Higgins's failure to mention any prior application, she had not put this in hand. She has just heard that this point is being raised and had now put a search in hand although she did not know the result. She had said in her written evidence at page 34 in the e-bundle lodged that a fee is paid on application with a 'part 2 fee' to be paid at a later stage. Bristol City Council had received no application fee prior to 21st February 2020.

Discussion as to Liability

20. The Applicants have produced written statements from Cara Guthrie. The statements confirm that Ms. Guthrie is aware of the fact that if her statements are tendered in evidence, she is liable to prosecution if she has wilfully stated in it anything that she knows to be false or does not believe to be true.
21. The statements record that on 2nd April 2019, Bristol City Council designated Cromwell Road as being within an additional selective HMO licensing area if the property in question was rented to 3 or 4 people from 2 or more households sharing one or more basic amenities. The 1st and 3rd Applicants are not related and had not been members of the same household but were living together at the property, sharing kitchen bathroom and toilet. As has been said, it was later clarified that for the period 8th July 2019 until 29th September 2019, another unrelated tenant was living at the property as well.
22. The designation is said to have come into effect on the 8th July 2019 and the 2nd Applicant, unrelated to the other 2, says that she joined the other 2 Applicants in the property sharing the same facilities but was not part of a 'household' with either on "31st September 2019". This cannot be right as, of course, September only has 30 days. The Tribunal has seen a copy of an Assured Shorthold Tenancy Agreement for the property with the 3 Applicants as tenants which is not actually dated but is said to run from the 30th September 2019 to 29th September 2020. It was signed on behalf of the Respondent on 4th October 2019 and by the Applicants on the 1st and 3rd October. The rent was said to be £1,275.00 per month, payable in advance.
23. In her 'defence' commencing at page 164 in the e-bundle, the Respondent raises a number of matters. Firstly she says that she had applied for an HMO licence "*as it was required and not to do so would be foolish*". She then says "*I cannot recall if the application was made on system or on paper I recall both, ...*". Further on she adds "*I reasonably believed that I had made an application ahead of the designation date of*

8th July 2019 and recall visiting Andrews (her managing agent) around this date and confirming my application was made”.

24. She then says that she visited Bristol Council offices in February 2020 and they said that they could not find any application. She then says “...*I could not find the payment of a part 1 licencing fee or any copies from my ipad, but knew the date of application and I reapplied using the same information for the licence application”.*
25. She produces a copy of a decision made by a First-tier Tribunal on 23rd March 2020 relating to 8 Tyndalls Park Mews, Bristol BS2 8DN which is **Isbell and others v Aikman** CHI/00HB/HMF/2019/0013 and, so she says, this supports her claim that the application for the licence must have been made at the appropriate time. There are 2 things to record. Firstly, this Tribunal is not bound by any prior decision of the First-tier Tribunal and secondly, the facts in that case were very different.
26. In **Isbell**, the evidence was that there was an existing HMO licence for that property which expired on the 27th August 2018. It was then alleged that the application for renewal was not made until 23rd October 2018 and an offence was being committed in the intervening period. In fact the landlord produced an e-mail from an Environmental Health Officer dated 18th July 2018 which started with the words “*I contact you with regards the apartment in the HMO license application form that we have recently received. thank you [sic] for making the application ahead of expiry”.*
27. That Tribunal held, not unreasonably, that this was clear evidence that an application for renewal had been made prior to the existing licence having expired which would have provided an absolute defence to any subsequent prosecution. In the case now being determined, there is no such evidence. The Respondent cannot produce any copy of an application, evidence of payment of a fee before February 2020 or any statement from her managing agent that she called on them around the 8th July 2019, as alleged. She also says that she knew the date of the application but has not mentioned that. On the other hand, the Applicants’ evidence is clear i.e. that no application for an HMO licence was made prior to 21st February 2020.
28. Also as to liability, the Respondent asserts on page 165 that as the alleged offence was committed on the 8th July 2019 and the application for an RRO was not “given to” her until 1st September 2020, “*the date from offence is in excess of 12 months and the RRO is invalid”.* In the document the applicants call their ‘skeleton’ argument, they refer to the decision of the Administrative Court dated 7th May 2020 in two judicial review cases brought by **Mohamed & Lahrie** [2020] EWHC 1083 (Admin). That case makes it clear that this sort of offence is a continuing offence. Thus, it started on the 8th July 2019 and continued on a daily basis thereafter. The Applicants say that there was a breach on the 30th September 2019 and thereafter upon which they rely.
29. Section 72(4)(b) simply says that it is a defence to a prosecution for a lack of an HMO Licence to satisfy the court that “*at the material time...an application for a licence had been duly made”.* Proof of such an application would be the civil standard of proof i.e. on the balance of probabilities.

30. In this case, this application for a RRO was made on the 24th July 2020 and the amount being sought is rent paid from 30th September 2019 until the 20th February 2020. For that whole period, the alleged offence was being committed on a daily basis and the amount being claimed is all within the one year period prior to the date of this application.

Conclusion as to Primary Liability

31. The Tribunal is reminded of the words of Judge Cooke in the Upper Tribunal case of **Paulinus Chukwuemera Opara v Marcia Olasemo** [2020] UKUT 96 (LC) when she criticised a First-tier Tribunal of being over cautious in considering the words 'beyond reasonable doubt'. She said this:

"...For a matter to be proved to the criminal standard it must be proved 'beyond reasonable doubt'; it does not have to be proved 'beyond any doubt at all'. At the start of a criminal trial the judge warns the jury not to speculate about evidence that they have not heard, but also tells them that it is permissible for them to draw inferences from the evidence that they accept..."

32. On the evidence produced and discussed above, the Tribunal is satisfied beyond a reasonable doubt that an offence was being committed by the Respondent under section 72 of the 2004 Act as she had control or management of the property from 8th July 2019 until at least the 20th February 2020. If there had been a prosecution of the Respondent then it would have been a defence for her to show that she had applied for an HMO licence. She says that she considers that she must have done on or about 8th July 2019, but Ms. Guthrie's statement says that the Respondent only applied on the 21st February 2020 and liability under an RRO therefore ceased on the 20th February.

33. Ms. Higgins is a qualified accountant and will know the need to be very particular about both the obtaining of the licence on time and the need to keep accurate records and copies of documents submitted. There is mention of her laptop having problems at the time but, again, there is no evidence of this and no suggestion that any search has been made on her computer server to trace a copy of an application either made on line or as a paper application. A fee was obviously payable on making an application for an HMO licence but there is no evidence from either side of a fee having been paid prior to 21st February 2020. Her assertion is, in effect, that even though there is no evidence whatsoever to confirm it, she must have made an application on time.

34. She has no copy of any application, she clearly did not in fact pay an earlier fee and whilst she says that she spoke to her managing agent, Messrs. Andrews, about this in July 2019, she has produced no evidence to confirm that. On the other hand, Ms. Guthrie says that when she spoke to Ms. Higgins on the 17th February 2020, she made no mention of any previous application and her recollection was that Ms. Higgins said that she had only contacted the Council because Messrs. Andrews had reminded her of the need for a licence.

35. Ms. Higgins has raised the issue of the number of applications made for HMO licences during the relevant period. She has produced evidence that the numbers were substantial, which is only to be expected for this new scheme. She suggests that applications will have become lost and mentions the **Isbell** case which, she says, supports her assertion. As has been said, **Isbell** does not support her assertion because, in that case, there was clear evidence that an application had been made.

Discussion as to Amount Payable

36. The Applicants' application claims an RRO for the period from 9th October 2019 until 21st February 2020 in the total sum of £5,694.00. The application for a licence was received by the local authority on 21st February 2020 which means that the Respondent has a defence for that date.

37. In their subsequent submissions on page 97 of the bundle, the Applicants say that they have been advised by Bristol City Council that a very recent decision of a First-tier Tribunal says that the offence date could be 8th July 2019 and the claim is therefore increased by an additional £329.27 for the period from 30th September to 9th October 2019. No copy of any decision or case number thereof has been produced but this Tribunal accepts that an offence was committed on 8th July albeit with one of the tenants being different. Of course these Applicants are only claiming from 30th September 2019.

38. The difference between the 30th September and the 9th October seems to arise because of a notification said to have been given by Bristol City Council to landlords that the deadline for all licence applications was the 8th October 2019. It was therefore assumed, wrongly, that an offence was not being committed between 30th September and 9th October.

39. The Tribunal considers that it would be more realistic to calculate a daily rate and then see how many days are covered by the offence. The 9th October 2019 until 20th February 2020 (see above as to this date) inclusive consists of 135 days. The annual daily rate at £1,275.00 per month is £41.92. The total for the initial period claimed is therefore $£41.92 \times 135 = £5,659.20$. Ms. Cock commenced living at the property on the 30th September and the Tribunal therefore accepts the proposition that for these 3 Applicants, 9 days should be added to the maximum amount payable i.e. $9 \times £41.92 = £377.28$ making a total of £6,036.48.

40. The 2016 Act changed the way in which Tribunals should consider the calculation of an RRO. Under the 2004 Act, the Tribunal's calculation had to be tempered by a requirement of reasonableness. For example, the landlord should only be ordered to repay any profit element from the rent. As was confirmed in the Upper Tribunal case of **Vadamalayan v Stewart** [2020] UKUT 183 (LC), section 44 of the 2016 Act says, in effect, that the Tribunal should no longer consider such matters as what profit would have been earned by the rent paid. In other words, expenses incurred by the landlord as a result of obligations to keep a property in repair, insured etc. under the terms of a tenancy agreement would have had to be incurred in any event and should not be deducted.

41. The starting point is therefore the actual rent paid during the relevant period. Such matters as the parties' conduct or the landlord's financial hardship can be used to assess any claim as can such expenses as utilities paid by the landlord, of which there is no suggestion, in this case.

Conclusion as to the Amount of any Order

42. The Respondent does allege that there would be financial hardship if she was ordered to repay rent and she asks that no order be made. She says (page 163 of the e-bundle) that she works 3 days a week as a waitress and her hours have been cut by 40% as a result of the current pandemic. That changed to 2 days per week in her evidence. She says that she rents out "a single property" which is to be her pension when she retires.

43. As to the conduct of the parties, there is much discussion in the documents about the condition of the property and the fact, for example, that there was a damp and mould problem which the Respondent says she thought she had dealt with at the time. The Respondent also says that the Applicant's conduct cannot be criticised.

44. In her initial written representations, the Respondent also produces a copy of another First-tier Tribunal case relating to the top floor flat at 9 Dover Place, Bristol BS8 1AL. This is the case of **Ahmed and others v Rahimian** CHI/00HB/HSD/2020/0002 which was determined by Regional Judge Tildesley OBE. It is unclear why she has produced this decision. She says, at page 126, that "*the reason for me adding this is that the Landlord confirms the system at the time was not yet fully operational*".

45. As has been said, another First-tier Tribunal decision is not binding on this Tribunal. However, as the parties have seen this case and the merits on either side are similar to the present case, it is worth considering. This Tribunal agrees with that decision and reasoning. It sets out at length the law and reasons for a determination of about half of the maximum amount which could have been awarded i.e. £10,000 ordered as opposed to the maximum of £19,803 which could have been awarded. The £10,000 was split equally amongst the 3 Applicants and the Tribunal also ordered the Respondent landlord to reimburse the £300 in Tribunal fees paid.

46. As in this case, allegations were made in **Ahmed** that the landlord had not kept the property in good repair and there had been some minor problems. However, Judge Tildesley determined that the landlord was a responsible person who provided accommodation of reasonable/good standard with adequate facilities. This Tribunal does not consider that this Respondent's conduct as a landlord to these tenants should affect the amount of the RRO in any negative way as she did make efforts to deal with the problems raised at the time albeit not to the satisfaction of the tenants. For the avoidance of doubt, it should be said that this Tribunal is not required to consider any sort of compensation claim.

47. The landlord in the **Ahmed** case also blamed the pandemic for a poor financial situation. In fact the only real differences in these 2 cases as far as the landlord's conduct was concerned, was the fact that the landlord in **Ahmed** could be described as

more of a professional landlord than the Respondent in this case. This could have led to a higher order. On the other hand, the landlord in **Ahmed** let some of her properties through Bristol City Council Private Renting Scheme and helped with providing accommodation for people with complex needs through The Maples Community and that good conduct was acknowledged.

48. It should also be recorded that in **Ahmed**, the tenants accepted that they had not behaved well and this could have led to a lower RRO.

49. There has been no appeal against the **Ahmed** decision and, overall, this Tribunal considers that the material facts and circumstances in that case were so similar to this case that the same broad conclusions will be drawn. As has been said, there were some factors in **Ahmed** which could have led to both a higher figure and lower figure than in this case. It is also accepted that the Respondent in this case is not particularly well off but the level of RRO determined should not put her in a particularly bad financial position.

50. Judge Tildesley OBE in **Ahmed** said, in awarding £10,000 (paragraphs 102 & 103);

“This is not a case which justifies an award of the maximum amount of £19,803.00. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description....The Tribunal here is dealing with two sets of decent honourable persons who are separated by the fact that the Respondent failed to licence the HMO and thereby committed an offence...”

51. This Tribunal determines that the total sum £3,000.00 should be repaid to the Applicant tenants i.e. a similar proportion to the **Ahmed** case, plus the fees paid to the Tribunal.

52. As a final point, the Tribunal is conscious of the fact that Bristol City Council is conducting a search to see if an earlier application for a licence had been made by the Respondent. The Council must notify the Respondent of the result of this search. If in fact it is found that such an earlier application was made, the Respondent will no doubt apply for permission to appeal this decision. Rule 51 of the Tribunal’s procedural rules will enable the Tribunal to correct any injustice.

53. The Tribunal did consider whether this decision should be held over until the result of the search was known but decided that in view of the particular circumstances of this case and the complete lack of evidence of any earlier application, such a delay would be unreasonable.



.....

Judge Edgington
4th December 2020

ANNEX - RIGHTS OF APPEAL

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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.