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

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| **Case reference** | **:** | **LON/00BE/HMF/2020/0184** |
| **HMCTS code (paper, video, audio)** | | **V: CVPREMOTE** |
| **Property** | **:** | **71 Asylum Road, London SE15 2RJ** |
| **Applicant** | **:** | **Jenna Booker (1)**<br>**Georgia Smith (2)** |
| **Representative** | **:** | **-** |
| **Respondent** | **:** | **Bernard Properties LLP** |
| **Representative** | **:** | **Adam Richardson of counsel** |
| **Type of application** | **:** | **Application for a rent repayment order by a tenant**<br>**Sections 40,41,43 & 44 of the Housing and Planning Act 2016** |
| **Tribunal member(s)** | **:** | **Judge D Brandler**<br>**Mrs L Crane MCIEH** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR**<br>**By remote video hearing** |
| **Date of hearing** | **:** | **29th July 2021** |
| **Date of decision** | **:** | **5th August 2021** |

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**DECISION**

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**Decision of the tribunal**

**(1) The Respondent shall pay to the Applicants a Rent Repayment Order in the sum of £16,800 in the following proportions:**
**(i) To Jenna Booker the sum of £8,400.00**
**(ii) To Georgia Smith the sum of £8,400.00**

**(2) The Respondent is further ordered to repay to the Applicants the sum of £300 for the fees paid to this tribunal in relation to this application.**

The relevant legislative provisions are set out in an Appendix to this decision.

## Reasons for the tribunal's decision

### Background

1. The tribunal received an application under section 41 of the Housing and Planning Act 2016 from the Applicant tenants for a rent repayment order ("RRO").

2. The application alleged that Bernard Properties LLP ("the Respondent"), the landlord of the property, had failed to obtain an additional licence for the property in breach of HMO licencing requirements within the LB Southwark ("the Council") which was introduced on 01/01/2016 and was in force until 31/12/2020.

3. The history of the occupancy is as follows. Jenna Booker (the 1st Applicant), Georgia Smith ("the 2nd Applicant") and Tabitha Beresford-Webb, entered into a 14-month fixed term AST agreement with the Respondent for the 3-bedroom semi-detached house at 71 Asylum Road, London SE15 2RJ ("the property"). They later entered into an extension to that agreement for a further 14 months.

4. The Applicants' each had the use of their own bedroom, with Miss Webb occupying the 3rd bedroom. They shared bathroom and kitchen facilities which were on the ground floor.

5. A deposit of £2907.69 was paid to the Respondent, which was returned at the end of the tenancy. The monthly rent for the property was £2,100.00 to be paid in advance.

6. The Applicants seek to recover by way of a RRO under s.44 of the Housing and Planning Act 2016 ("The 2016 Act") the rent for the period from 12th December 2018 to 12th February 2020. The sum claimed is £29,400.

7. In September 2020 the 1st Applicant issued the first claim in these proceedings in which she erred and named the respondent incorrectly as being Georgia Smith. On 10/02/2021 a new claim form was sent by

her to the Tribunal naming the correct parties. Directions were issued on 15/02/2021 but were mistakenly not sent to the respondent. They were therefore re-issued by Judge Vance on 05/05/2021 and were emailed on that date to both the 1st applicant and Miss Bernard from the respondent company.

8. At the first hearing of this application on 29/06/2021 Miss Bernard didn't know whether she had received the amended directions as she said sometimes emails went into her spam folder. Further she told the Tribunal that she had not previously understood that the application could result in a finding that the Landlord had committed a criminal offence, and when this was explained to her she applied for an adjournment to seek legal advice.

9. A further difficulty encountered by the Tribunal at that first hearing was that they did not have before them the amended tribunal bundles submitted by the 1st Applicant and it was in the interests of justice to permit an adjournment in all the circumstances.

**PRELIMINARY ISSUES**

10. On the morning of the hearing the Tribunal received a skeleton argument on behalf of the respondent which attached to it a number of emails which had not previously been disclosed. The skeleton argument seeks to adduce new evidence to support Counsel's claim of a fraud instigated by the Applicants, and he says the emails attached to his skeleton prove the fraud. The fraud he alleges is that Miss Beresford-Webb was not living in the property during the period claimed by the Applicants, and the emails disclosed as further evidence are said to support that argument. No application to adduce late evidence was before the Tribunal. Also submitted by Counsel is the case of Mortimer and another v Calcagno [202] UKUT 122 (LC).

11. In Mr Richardson's oral application to adduce new evidence he states that

    (i) That although the emails all predate the application and the directions order, they had only recently come into the respondent's possession when she had asked her letting agents for email correspondence they had in this matter; and
    (ii) That the emails show that Miss Beresford-Webb was not living at the property during the period claimed by the applicants

12. The Applicants in response say that Miss Beresford-Webb lived with them at the property and say that she only moved out in February 2020.

13. Having considered the submissions, the tribunal found no good reason was provided by the respondent for not having made enquiries of her

agents such that she could adduce evidence in accordance with the directions. There had been sufficient delay due to administrative issues, as outline above, which would have given the respondent time to do this.

14. In relation to the allegation of fraud, and Counsel's assertion that the newly acquired historic emails support that allegation, the tribunal found that they did not. At their highest the emails indicate that Miss Beresford Webb was enquiring about how she could give notice, and whether she would have to find a replacement, and that she would like to leave as soon as possible. No evidence was provided to evidence her having acted on that initial enquiry.

15. The tribunal could find no good reason to admit newly adduced historic emails today in breach of directions and the application was refused. Similarly, any argument in the skeleton argument referring to this late evidence also be struck out.

**THE HEARING**

16. The Tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.

17. This has been a remote hearing which has not been opposed by the parties. The form of remote hearing was coded as CVPREMOTE with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The Applicants' revised Bundles totalling 72 pages. The Respondent submitted a bundle of documents, mostly duplicates of the applicants' documents against which comments in red have been made. This bundle of documents number 52 pages, with an additional string of emails from 8th and 9th July 2021 between her and the Council in relation to whether or not the property required licencing. A letter dated 12/07/2021 from Miss Bernard has been submitted to the Tribunal in which she asserts that "*There was no HMO scheme in place from Southwark Council around the time of December 2020*".

18. The Applicants attended the hearing remotely by video connection. They were in person. The Respondent was represented by Adam Richardson of counsel who joined by video connection. Miss Bernard, a property manager from the Respondent company also joined by video connection.

19. In oral evidence the Applicants confirmed that they had entered into an AST agreement and moved into the property on 12/12/2018 and moved

out on 11/04/2021. They explained that Miss Beresford-Webb delayed moving in by some 7-10 days after they moved in. They could not recall the exact date, and that Miss Webb moved out on 11/02/2020. When she moved out, she was replaced by a couple, Sam and Meg, who moved into her room the day after she moved out and remained there until around the same time as the applicants moved out. This was not disputed by Miss Bernard.

20. The 1st applicant confirmed that she had paid the full rent to the respondent of £2100 pcm, but that the rent was divided equally between the three tenants, each tenant contributing £700 pcm. No rent arrears are claimed by the respondent who has returned the deposit to the applicants. Neither of the applicants received Universal Credit or Housing Benefit for the period claimed.

21. The 2nd Applicant described to the Tribunal the problems experienced in the property with drafty windows, a leaking flat roof and mould. The 1st Applicant explained that her step father had to put bubble wrap over her window on the top floor as it was so cold in the room. The respondent having told them to put a heavy curtain up. The windows were eventually all replaced in February 2020. The installation of new windows was confirmed by Miss Bernard.

22. There were issues with leaks from the flat roof directly into the 2nd applicant's bedroom. She explained that the flat rooves at the property did not appear to have proper drainage, and when it rained, the water had nowhere to go and leaked through onto her bed. She described having to put a bucket on her bed when she went out in the morning in case it rained. Photographs have been provided of staining on the ceiling. Miss Bernard confirmed that there had been ongoing problems with flat rooves at the property and that the management company had not managed the repairs very well so that issues had been ongoing.

23. The 2nd Applicant explained that they had originally sought assistance from the Council because of the ongoing leaks at the property and the mould. There had been some delay in the visit from the Council due to lockdown, but after their visit an EPA Notice under s.80 was issued to the respondents on 23/03/2021.The Council told the applicants that the property should have been licenced and advised them to make an application for a rent repayment order.

24. The letter dated 23/03/2021 to the 2nd Applicant from Southwark Council confirms that additional and selective licensing schemes were introduced on 01/01/2016 and were in force until 31/12/2020 and that no application has been made in relation to the property. In Miss Bernard's email correspondence with the Council on 8th and 9th July 2021, Mr Aziz, a Private Sector Housing Enforcement & Licensing Support Officer confirms that "*under normal circumstances, your property would require a licence, however the Selective and Additional licensing schemes came to an end on the 31 December 2020…*"

25. The Applicants say that the owner of the property, Mr Mario Bernard would visit the property without notice and was rude to them, accusing them of being dirty, the suggestion being that it was the applicants' fault that there was mould in the property.

26. Miss Bernard in oral evidence didn't know when Miss Beresford-Webb had moved out of the property. Although in an email from her to the tenants dated 19/12/2019 she addressed all three of the tenants, and when asked about the email, she said she had copied Miss Beresford-Webb into that email by 'bcc'. She said in oral evidence, that she had to copy Miss Webb into that email as she was a tenant. It is her position therefore that Miss Webb was in occupation of the property at least until 19/12/2019. No evidence was adduced by Miss Bernard, either prior to the hearing or in the late evidence produced on the day of the hearing, to demonstrate that Miss Beresford-Webb had left the property prior to the date suggested by the Applicants. Nor did Miss Bernard deny or challenge the assertion by the Applicants that the new occupiers of Miss Beresford-Webb's room had moved in the day after Miss Beresford-Webb had moved out. Nor did she challenge the evidence of those replacement tenants.

27. At the previous hearing on 29/6/2021, the judge noted at a paragraph 14 that Miss Bernard disputed whether the "*Property required a licence, because it was only occupied by 3 persons"*. At that stage Miss Bernard's case appeared to be that there had been 3 people in occupation. Her case presented at the final hearing by Counsel is that there were not 3 people in occupation. However, the only evidence which she says confirms that Miss Beresford-Webb didn't move in in December 2018 was the tenancy agreement with an electronic date of 19/03/2019.

28. Miss Bernard in defence of the allegations of mould and damp, that the applicants could have moved out and not renewed for a further 14 months. The applicants say that the end of the contract was leading up to the first lockdown which would have made it extremely difficult for them to find new accommodation. This was made more difficult by people not moving at that time and there being additional difficulties of finding removal people.

## **FINDINGS**

29. The Tribunal was satisfied beyond reasonable doubt that the Respondent was in breach of the additional licence requirements during the period of 11/02/2019 to 11/02/2020 and found that the property was occupied by three occupants, that is the two applicants and Miss Beresford-Webb. This period being the maximum of 12 months, ending on the date on which Miss Beresford-Webb moved out.

30. The Tribunal found the Applicants' oral evidence about occupation consistent and credible. They did not know the exact date Miss Beresford-Webb had moved into the property, but thought that she had moved in within 7-10 days of them. In relation to the electronically signed tenancy agreement, the tribunal accepted the applicants' evidence that this was only electronically done once Miss Webb's refences were finalised and as they said, they had no control about how Miss Bernard managed documentation.

31. As Miss Bernard did not know whether Miss Webb had moved out of the property, the Tribunal preferred the applicants' evidence on this issue. Miss Bernard is an experienced property manager having confirmed that the respondent company own and/or manage between 50-100 properties. It was difficult to reconcile this experience to someone who didn't know if one of her tenants had moved out or not. In any event her own email dated 19/12/2019 in her bundle is addressed to all three tenants and when asked about that, she said she had to write to Miss Webb as she was a tenant.

32. Miss Bernard's evidence about the repair issues at the property sought to put blame on the tenants for failing to open the windows enough, and asserting that their plants had caused the condensation. However, the photographs of the mould on the walls reaching up to the ceiling indicate a problem which is more than condensation caused by plants. Her evidence on this issue is also inconsistent with her own evidence about the ongoing problems with the flat rooves, the need for the respondent to have redecorated the whole property due to those problems and the need for all the windows to have been replaced in February 2020. Certainly, the Council would not have served an EPA notice on the respondents if the evidence was only of condensation from the tenants' plants.

33. In an attempt to detract from this the Tribunal were referred to a "*gas safety certificate*" which mentions issues with plants and not heating the property sufficiently. This document is clearly not a gas safety certificate, of which none were produced for the hearing.

34. All of this indicated to the Tribunal that there were serious issues with dampness and mould in the property which had not been effectively dealt with, and which the applicants had to suffer to their detriment in terms of damaged belongings and danger to their health.

35. Therefore, the only further issue for determination by the Tribunal is the amount of the RRO.

36. In determining the amount, the Tribunal must have regard to the conduct of both landlord and tenant, the landlord's financial circumstances and whether the landlord has been prosecuted.

37. There is no evidence to challenge the conduct of the Applicants. They paid their rent on-time. Indeed Miss Bernard had confirmed that the

deposit had been returned. It was only as a result of the difficulties in the house that they approached the Council at which point they discovered that the Property should have been licenced.

38. The conduct of the respondent was lacking. The Tribunal found that Respondent had failed to deal with the repair issues at the property effectively. Submissions were made to suggest that the respondent is not liable for the works carried out by a contractor. That argument is rejected. The applicants lived in a property that suffered leaks, mould and damp and in addition the owner of the property made disparaging remarks to his tenants.

39. The Respondent has provided no evidence of financial circumstances or any evidence of utility payments paid. No deductions are therefore made.

40. The Respondent has not been prosecuted by the Council for not licensing the property.

41. The Tribunal keeps in mind that a RRO is meant to be a penalty against a landlord who does not follow the law. It is a serious offence which could lead to criminal proceedings. Taking these matters into account and the evidence of the landlord's conduct, we consider that the award should not be reduced. Accordingly, we find that an RRO should be made against the Respondents to reflect the amount of rent paid by the Applicants during the relevant period, that is £16,800.00, which should be repaid to the Applicants in the following proportions

    (i) To Jenna Booker the sum of £8,400.00
    (ii) To Georgia Smith the sum of £8,400.00

42. The Respondent is also ordered to pay to the Applicants the sum of £300 being the tribunal fees paid by them in relation to this application.

**Name:** Judge D Brandler **Date:** 5th August 2021

## ANNEX - 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

### Section 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.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

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

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

## Housing and Planning Act 2016

## Chapter 4 RENT REPAYMENT ORDERS

## Section 40 Introduction and key definitions

(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.

(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 by that landlord.

| | Act | section | general description of offence |
|---|---|---|---|
| 1 | Criminal Law Act 1977 | section 6(1) | violence for securing entry |
| 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).

**Section 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.

**Section 43** **Making of 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 has 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 in accordance 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).

**Section 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 the table.

| ***If the order is made on the ground that the landlord has committed*** | ***the amount must relate to rent paid by the tenant in respect of*** |
|---|---|
| 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 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.

(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.