



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

Case Reference : **BIR/OOCN/HMK/2019/0047**

Subject Property : **35 Bragg Road
Birmingham
B20 3DB**

Applicants : **Mr Sachin Sugathan**

Representative : **Ms Sereena Grant**

Respondent : **Mr Asad Choudhry**

Representative : **None**

Type of Application : **Application under section 41(1) of the
Housing and Planning Act 2016 for
rent repayment orders**

Date of Hearing : **7th October 2019**

Tribunal Members : **Graham Freckelton FRICS (Chairman)
Robert Chumley-Roberts MCIEH, J.P**

Date of Decision : **11th October 2019**

DECISION

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INTRODUCTION

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').
2. The Housing Act 2004 ('the 2004 Act') introduced licensing for houses in multiple occupation (HMOs). Originally, licensing was mandatory for all HMOs which have three or more storeys and are occupied by five or more persons forming two or more households. Since 1st October 2018 all HMOs which are occupied by five or more persons forming two or more households, are subject to mandatory licensing. Under additional licensing, a local housing authority can require licensing for other categories of HMO in its area which are not subject to mandatory licensing. The local housing authority can do this if it considers that a significant proportion of these HMOs are being managed sufficiently ineffectively so as to give rise to one or more particular problems, either for the occupants of the HMOs or for members of the public.
3. Under section 72 of the 2004 Act a person who controls or manages an HMO that is required to be licensed (pursuant to mandatory or additional licensing) but is not so licensed commits an offence and is liable on summary conviction to a fine.
4. The criminal sanction for failing to obtain a licence is supplemented by the scheme of civil penalties known as rent repayment orders. Under section 73 of the 2004 Act, where a person who controls or manages an unlicensed HMO has been convicted, the (former) occupiers of the unlicensed HMO may apply to the First-tier Tribunal for rent repayment orders.
5. However, from 6th April 2017, subject to transitional provisions, the 2016 Act has amended the provisions relating to rent repayment orders in England. Under section 43 of the 2016 Act the First-tier Tribunal may make a rent repayment order in favour of the (former) occupiers if it is satisfied beyond reasonable doubt that the landlord has committed an offence under section 72 of the 2004 Act, *whether or not the landlord has been convicted*.

BACKGROUND

6. The Applicant is the former tenant of a room at 35 Bragg Road, Birmingham, B20 3DB ('the subject property').
7. The Respondent is the owner of the subject property.
8. The Application was received by the Tribunal on 26th July 2019. The Applicant referred to above applied for a Rent Repayment Order under section 41 of the 2016 Act. The Applicant alleges that the Respondent was controlling or managing the subject property, which, as a property occupied by five or more people forming two or more households, was a House in Multiple Occupation and required to be licensed. It was noted that the Application was dated 25th August 2019 but as it was received on 26th July this was accepted by the Tribunal as an error and it should have been dated 25th July 2019.
9. Directions were issued on 30th July 2019 following which submissions were made and copied to the other party.
10. It is apparent from the documentation received from the Applicant that the property was occupied by him on an Assured Shorthold Tenancy dated 29th

March 2018 for a term of six months from 29th March 2018 at a rental of £385.00 per calendar month.

11. The Application confirms that the Applicant is requesting a rent repayment for the period 1st October 2018 to 31st May 2019 (Eight Months). This latter date was the date the Applicant vacated the subject property.

THE LAW

12. The relevant provisions of the 2016 Act, so far as relevant, are as follows –

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 ...

(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
5	Housing Act 2004	Section 72(1)	Control or management of unlicensed HMO

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.

...

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);

...

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.

<i>If the order is made on the ground that the landlord has committed an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)</i>	<i>the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence</i>
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(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.

THE PROPERTY INSPECTION

13. The Tribunal inspected the subject property on 7th October 2019 in the presence of Mr A Choudhry (the Respondent) and Mr I Choudhry.

14. The property comprises of a detached house situated in an established residential area.

15. The property is built of traditional brick construction having rendered elevations and a pitched tiled roof. There is a large single storey rear extension of cavity brick construction having a flat felt roof. The Tribunal understands that the rear extension was completed approximately five – six years ago.

16. Briefly the property comprises of a ground floor entrance porch leading to a hallway with stairs off to the first floor. There are three let bedrooms, a communal kitchen, bathroom with three-piece sanitary suite having a shower mixer over the bath and further W.C. with low flush suite and wash hand basin. The Tribunal was unable to inspect the front bedroom.

17. On the first floor there are four letting bedrooms and shower room with shower, W.C and wash hand basin. The Applicant occupied the front first floor bedroom which the Tribunal inspected. The room was furnished with a double bed, table, chairs and chest of drawers. There was a built-in wardrobe. All the bedrooms inspected by the Tribunal were fitted to a similar standard.

18. To the front of the property was a slabbed garden area and to the rear a good size garden with slabs and gravel.

19. The property has full gas fired central heating and full upvc double glazing. There are smoke alarms fitted throughout and it was confirmed by the Respondent that although there were previously smoke alarms in the

communal areas they had more recently been fitted to the bedrooms as part of the application for an HMO Licence.

20. The Tribunal found the property to be well maintained and in generally good condition throughout.

THE HEARING

21. Following the inspection, a Hearing was held at The Tribunal Office, Centre City Tower, Hill Street, Birmingham, B5 4UU. The hearing was attended by Mr A Choudhry (the Respondent), Mr I Choudhry, Mr S Sugathan (the Applicant) and Ms S Grant (the Applicant's Representative).
22. The submissions made by the parties in writing and at the Hearing are summarised as follows:

The Applicant's Submissions

23. The Applicant submitted that from 1st October 2018 the property was an unlicensed HMO and remained unlicensed until his departure on 31st May 2019.
24. The Applicant further submitted that the subject property is a two-storey house with three bedrooms on the ground floor and four further bedrooms on the first floor. The property has a communal kitchen and shared bathroom facilities.
25. The Applicant moved into the property on 29th March 2018 from which time he paid rent of £385.00 per calendar month. From October 2018 there have consistently been at least five persons living in the property and apart from one married couple none of the occupants were related to each other.
26. At various times during the tenancy until the end of March 2019 until the end of May 2019 the Applicant's partner, Sereena Grant, stayed at the property with him. The Respondent was aware of this situation and charged an additional £50.00 per calendar month for her to stay in the property.
27. The total Rent Repayment Order the Applicant is applying to reclaim is £3,080.00 (eight months at £385.00 per calendar month).
28. The Applicant further submitted that he experienced mould within his room at times and that when he had mentioned this to the Respondent, he had been given a spray to clean it off. At the same time the Respondent has also been aggressive to him, threatening to throw him out when he voiced concerns about the property being too cramped, especially the kitchen.
29. The Applicant also submitted that he understands the Respondent owns at least two other properties although he does not know the addresses of them.

The Respondent's Submissions

30. The Respondent submitted that the subject property is a large detached house comprising of seven letting bedrooms, 2 ½ bathrooms and a large kitchen/diner measuring 16.27 m² with a separate sitting area. The Respondent was of the opinion that a kitchen diner of 16.27 m² is not cramped as the Applicant had claimed and that no other tenant had complained about it. It was submitted that the property was renovated in 2012 under supervision of the building regulations department (Acivico).

31. Prior to 1st October 2018 the Respondent had telephoned Birmingham City Council HMO Licensing Department and informed them that his property was a two-story detached house and asked whether he needed an HMO Licence. At that time, he was informed that as the property was only two storeys it did not need licensing as only properties which were three storeys or over with five or more tenants needed to be licensed. The Respondent was unaware of the new rule in respect of HMO licensing which came into effect on 1st October 2018 requiring the property to be licensed.
32. When questioned by the Tribunal the Respondent confirmed that his telephone call to the Council had taken place four or five years ago.
33. The Respondent further submitted that this was an honest mistake on his part and that as soon as he received correspondence from the prosecution officer of the HMO Licensing Team in Birmingham, he attended a meeting with her and commenced work on the few minor issues that had been highlighted in the property.
34. The Respondent further confirmed that he submitted an HMO Licence Application for the subject property on 13th June 2019 and received a confirmation letter from Birmingham HMO Licensing Department that they had received it. At the present time the Licence has not been granted.
35. The Respondent also submitted in his written submission that in his opinion the Applicant should only be able to reclaim seven months' rent rather than eight months. The Applicant paid rent in advance with the last payment being on 30th April 2019, covering the period until he vacated at the end of May 2019. From October 2018 until April 2019 is seven months. Due to the cost of the renovation work carried out to the property the Respondent did not anticipate making any profit for the next five years or so.
36. The Respondent denied that he was in any way aggressive towards the Applicant. In fact, he had lost rent as other tenants had moved out of the property due to the Applicants' behaviour towards them at a rental loss of £3120.00.
37. It was accepted by the Respondent that the Respondent had accepted rent from the Applicant for a period when the property was an unlicensed HMO.
38. The Respondent confirmed that he incurred regular monthly expenses in respect of the property which amounted to £100.00 per room per calendar month. The cost of gas, electric, council tax, water rates, television licence and broadband totals £700.00 per month which equates to £100.00 per room. In addition to this maintenance and cleaning amounts to £40.00 per room per month and the Respondent submitted that the Applicant has excessively used electric heaters within his room which have increased his costs.
39. In addition to this the Respondent submitted that repairs to the door and door frame to the Applicants' room amounted to £50.00 and redecoration due to the Applicant smoking amounted to £300.00. As such his total loss of income and expenditure was £4450.00. The Respondent has also paid a fee of £1170.00 with the HMO Licence Application and has had to borrow money from his parents to pay same. As such the Respondent submitted that his financial position would make it very hard for him to make any reimbursement by way of a Rent Repayment Order.

40. The Respondent further submitted in his written submission that he does not own any other properties and that the two other properties the Applicant refers to are actually owned by the Respondents' parents. On being questioned by the Tribunal the Respondent confirmed that he did own 50% of another let residential property and that he did not have any further employment.
41. On further questioning by the Tribunal the Respondent also submitted that there was no mortgage on the property although he did owe money to members of his family who had loaned him funds to purchase/renovate the subject property.

DETERMINATION OF THE TRIBUNAL

42. The Tribunal considered the application in four stages –

- (i) Whether the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act in that at the relevant time he was a person who controlled or managed an HMO that was required to be licensed under Part 2 of the 2004 Act but was not so licensed.
- (ii) Whether the Applicants were entitled to apply to the Tribunal for rent repayment orders.
- (iii) Whether the Tribunal should exercise its discretion to make rent repayment orders.
- (iv) Determination of the amounts of any orders.

Offence under section 72(1) of the 2004 Act

43. In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord of the subject property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 72(1) of the 2004 Act. At the hearing he readily accepted that he had committed the offence which was an honest mistake.
- (i) Throughout the period from 1st October 2018 to 31st May 2019 the subject property was a house in multiple occupation subject to mandatory licensing.
 - (ii) The subject property was not licensed.
 - (iii) The Respondent was the person having control and/or managing the subject property.

Entitlement of the Applicants to apply for rent repayment orders

44. The Tribunal determined that the Applicant was entitled to apply for a rent repayment order pursuant to section 41(1) of the 2016 Act. In accordance with section 41(2), the Respondent was committing the relevant offence throughout the period when the subject property was let to the Applicant; and the offence was committed in the period of 12 months ending with the day on which the application was made (25th July 2019).

Discretion to make rent repayment orders

45. The Tribunal was satisfied that there was no ground on which it could be argued that it was not appropriate to make rent repayment orders in the circumstances of the present case.

Amounts of Rent Repayment Orders

46. In accordance with section 44 of the 2016 Act, first, the amount of an order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing an offence under section 72(1) of the 2004 Act. The Applicants' claim satisfies that condition.

Second, the amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. The Applicant claims rent repayment of £3,080.00 being eight months' rent paid. The Tribunal accepts that the relevant period amounts to eight months. As part of his original submission the Applicant provided copies of his bank statement from which it was evident to the Tribunal that there was only evidence of six payments having been made. On being questioned by the Tribunal the Applicant was unable to provide evidence to confirm whether additional payments had been made.

Following the conclusion of the hearing the Applicant sent an email to the Tribunal submitting that the rental payments were made in advance and that the claim should therefore be for seven months and not eight as in the original Application which was a mistake on his part.

Third, in determining the amount of any rent repayment order, the Tribunal must, in particular, take into account the conduct of the parties, the financial circumstances of the landlord and whether the landlord has been convicted of any of the offences listed in section 40 of the 2016 Act.

47. The discretion afforded to the Tribunal at the final stage of the determination of the amount of any rent repayment order was considered by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301 (LC); and the observations of the President in that case have received express approval in subsequent decisions of the Upper Tribunal. Although those observations were made in the context of the rent repayment order regime contained in the 2004 Act, in the view of the Tribunal many of them remain relevant in the context of the 2016 Act regime.

48. The following observations, contained in paragraph 26 of the decision in *Parker v Waller*, would appear to be relevant in the present case –

(iii) There is no presumption that the Rent Repayment Order (RRO) should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The Residential Property Tribunal (RPT) [now the First-tier Tribunal (Property Chamber)] must take an overall view of the circumstances in determining what amount would be reasonable.

(iv) [The 2004 Act] requires the RPT to take into account the total amount of rent received during any period during which it appears to it that the offence was being committed. It needs to do that because the RRO can only be made in respect of rent received during that period. It is limited to the period of 12 months ending with the date of the occupier's application. But the RPT ought also to have regard to the total length of

time during which the offence was being committed, because this bears upon the seriousness of the offence.

(v) The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not, in my judgment a material consideration or, if it is material, one to which any significant weight should be attached. This is because it is of the essence of an occupier's RRO that the rent should be repaid in respect of a period of his occupation. While the tenant might be viewed as the fortunate beneficiary of the sanction that is imposed on the landlord, it is only misconduct on his part that would in my view justify the reduction of a repayment amount that was otherwise reasonable.

(vi) Payments made as part of the rent for utility services count as part of the periodical payments in respect of which an RRO may be made. But since the landlord will not himself have benefited from these, it would only be in the most serious case that they should be included in the RRO.

(vii) [The Act] requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.

49. Distilling the substance of those observations and applying them to the facts of the present case, the Tribunal determines that various deductions should be made from the maximum amounts set out in paragraph 46.
50. The rent paid by the Applicant included gas and electricity charges, water and sewerage charges, broadband, Council Tax, television Licence and cleaning. On the same principle, as applied by the Upper Tribunal in *Fallon v Wilson [2014] UKUT 0300 (LC)*, the Tribunal determines that there should be further deductions to reflect part of those outgoings paid by the Respondent out of the gross rents received from the Applicant. The Tribunal finds that the benefit of those items accrued to the tenant (and not to the Respondent) and that the costs should not be included in the Rent Repayment Order. The Tribunal does not take into account the repairs to the door or redecoration as they are considered to be normal ongoing maintenance items. The Tribunal also disregards the Respondent's assertion that the Applicant incurred additional unnecessary electrical charges as they are disputed and cannot be proven or quantified.
51. Based on the written submission of the Respondent it is submitted that these expenses amounted to approximately £100.00 per room per month plus £40.00 per room per month for cleaning and general maintenance. However, invoices were not provided to support these figures so the Tribunal, exercising its jurisdiction as an expert Tribunal, assessed the various expenses and concluded that £100.00 per calendar month was an appropriate deduction including cleaning. No allowance was made for 'general repairs' as these cannot be quantified and in any case are the responsibility of the Respondent.

52. In accordance with section 44(4)(a) of the 2016 Act, the Tribunal considered the conduct of the landlord and tenant. The Tribunal finds that there is no evidence of conduct on either side which would affect its decision. Although the Tribunal notes that the Respondent is a professional landlord it finds that he did not deliberately flout the requirement to obtain an HMO Licence for the subject property and endeavoured to obtain a Licence as soon as its requirement was brought to his attention.
53. There are allegations of aggressive behaviour on both sides. The Respondent has produced letters from previous tenants alleging inappropriate behaviour towards them from the Applicant. These previous tenants were not called as witnesses before the Tribunal. At the same time the Applicant alleges inappropriate behaviour towards him by the Respondent. On the evidence presented to it and on the balance of probability the Tribunal is satisfied that there is nothing in the conduct of the parties to justify any adjustment to the amount of the Rent Repayment Order on either side.
54. In accordance with section 44(4)(b) of the 2016 Act, the Tribunal considered the financial circumstances of the landlord. Mr Choudhry confirmed that he obtained 50% of the rent from another property amounting to £650.00 per calendar month plus the rents obtained from the subject property. He has no other employment income. In his written submission the Respondent confirmed he has struggled to pay the Licence Application fee and at the hearing he confirmed he owed a considerable sum (in the region of £70,000.00 - £80,000.00) to family members although he did not have a mortgage. The Tribunal therefore determined not to make any further allowance to reflect financial circumstances.
55. The Tribunal considered the email sent to the Tribunal office by the Applicant following the conclusion of the Hearing in respect of the number of rental payments made but determined that it was inadmissible. The Applicant has had ample opportunity to prepare and submit his case. The Application Form requested repayment of eight months' rent. In the written submissions and at the Hearing the Applicant only provided evidence of six months' rent having been paid during the period. Following the Hearing the Applicant now submits it should actually be seven months. The Tribunal therefore determines that the appropriate amount for the starting point of the rent repayment order would be the gross rent paid of which evidence was provided either prior to or at the Hearing amounting to £2,310.00 (Six months' rent at £385.00 per calendar month).
56. The quantification of the rent repayment order is therefore: -
- | | |
|------------------|-----------------------------------|
| Gross Rent: | £385.00 per calendar month |
| Less Deductions: | <u>£100.00 per calendar month</u> |
| Total | £285.00 per calendar month |
57. The Tribunal therefore confirms the total amount of the Rent Repayment Order as follows:
- £285.00 per month for six months £1,710.00
58. The Tribunal therefore confirms the total amount of the Rent Repayment Order of £1,710.00. Payment should be made in full within 28 days of the date of this decision.

APPLICATION UNDER RULE 13(2)

59. On 3rd October 2019, prior to the inspection and hearing the Applicant submitted to the Tribunal, by email an Application under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 requesting reimbursement of £300.00, being the Application and Hearing Fee paid.
60. At the hearing the Applicant submitted that he had not requested a hearing on his Application Form but that the Tribunal determined that the matter could not be dealt with as a paper determination and that a Hearing had to be arranged. This had cost the Applicant an additional £200.00 which he had struggled to find.
61. The Respondent made no comment.
62. After consideration the Tribunal determined that although the Application Fee of £100.00 should not be reimbursed it was just and equitable that the Hearing Fee of £200.00 should be reimbursed to the Applicant. The Respondent shall, within 14 days reimburse the Applicant the sum of £200.00 being the hearing fee paid in relation to this Application.

APPEAL

63. Any appeal against this Decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date specified below stating the grounds on which that party intend to rely in the appeal.

Date: 11th October 2019

Graham Freckelton FRICS
Chairman
First-tier Tribunal (Property Chamber)