



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

Case reference : **LON/00AZ/HMF/2019/0028**

Property : **Flat Above, 191 Lewisham High Street,
London SE13 6AA**

Applicant : **Miss Samantha Podmore**

Representative : **In person**

Respondent : **Farmhold Investments Limited**

Representative : **Rice-Jones & Smiths solicitors**

Type of application : **Application for a Rent Repayment Order
by Tenant – Sections 40, 41, 43 & 44 of
the Housing and Planning Act 2016**

Tribunal members : **Judge Pittaway**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **17 December 2019**

DECISION

Decision of the tribunal

The tribunal makes a Rent Repayment Order in the sum of **£4,143** such sum to be paid by the respondent to the applicant within 28 days of the date of this decision.

The application

1. The Applicant seeks a determination under sections 41(1) and 41(3) of the Housing and Planning Act 2016 (the “**2016 Act**”) for a Rent Repayment Order (“**RRO**”) in respect of the flat known as Flat Above, 191 Lewisham High Street London SE 13 6AA. The flat is a four bedroom flat above a commercial property rented to four persons who are not related. They share the kitchen and two bathrooms. The local authority is the London Borough of Lewisham.
2. The application is dated 19 June 2019.
3. The applicant seeks a Rent Repayment Order for the period from July 2018 to June 2019 in the sum of £7550 made up as follows;
 - (i) £625 per month for the months July 2018 to February 2019; and
 - (ii) £637.50 per month for the months March 2019 to June 2019.
4. On 6 August 2019 the tribunal issued directions.
5. The applicant was directed to file a bundle of documents by 3 September 2019 including
 - (i) The application and accompanying documents;
 - (ii) The directions;
 - (iii) An expanded statement of reasons for her application;
 - (iv) Details of the alleged offence with supporting documents from the local housing authority, if available;
 - (v) A copy of her tenancy agreement;
 - (vi) A copy of the freehold title to the property;
 - (vii) Evidence of the rent paid in the applicable period;
 - (viii) A calculation of the weekly/monthly basis of the amount of rent paid in the applicable period;
 - (ix) The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/summary of their evidence, stating that it is true; and

- (x) Any other documents to be relied upon at the hearing.
6. The applicant complied with this direction.
 7. The respondent was directed to file a bundle of documents by 1 October 2019 to include
 - (i) A full statement of reasons for opposing the application, including any defence to the alleged offence and response to any grounds advanced by the applicant, and dealing with the issues identified above;
 - (ii) A copy of all correspondence relating to any application for a licence and any licence now granted;
 - (iii) The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/summary of their evidence, stating that it is true;
 - (iv) A copy of the tenancy agreement, unless included in the applicant's bundle;
 - (v) Evidence of the amount of rent received in the period, with details of the occupancy by the tenant on a weekly/monthly basis;
 - (vi) A copy of all correspondence relating to any application for a licence and any licence that has now been granted;
 - (vii) A statement as to any circumstances that could justify a reduction in the maximum amount of any rent repayment order;
 - (viii) Evidence of any outgoings, such as utility bills, paid by the landlord for the let property; and
 - (ix) Any other documents to be relied upon at the hearing.
 8. The respondent complied with this direction.

The Law

9. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

10. The applicant appeared in person at the hearing and the respondent was represented by Ms Dodds of counsel.
11. Immediately prior to the hearing each party handed in a skeleton argument.
12. The tribunal heard evidence from Mr Blaise Macklin of the London Borough of Lewisham and Ms Victoria Powers of Curchod & Co LLP, the respondent's managing agents.
13. At the hearing Ms Dodds raised a preliminary issue as to the admissibility of a "without prejudice" letter from the respondent to the applicant that the applicant had sent to the tribunal. The tribunal accept that the applicant was unaware that she should not have done so and stated that it would not have regard to this letter in reaching its determination.

The issues

14. At the hearing the parties identified the relevant issues for determination as follows:
 - (i) Had the respondent committed an offence under section 72(1) of the Housing Act 2004 (the "**2004 Act**");
 - (ii) If the respondent had committed an offence, the period during which the offence had existed;
 - (iii) To what extent the tribunal should exercise its discretion in ordering any RRO;
 - (iv) If the tribunal ordered an RRO how the tribunal should exercise its discretion in determining the amount of any RRO, having regard to the conduct of the landlord and the tenant, the financial circumstances of the landlord; and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies.
15. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows, and in its reasons refers to the evidence and parties' submissions as appropriate.

The tribunal's decision and reasons

Offence under section 72(1) of the 2004 Act

16. Ms Dodds submitted that for the tribunal to make a RRO under section 43 of the 2016 Act it is required by that section to be satisfied beyond reasonable doubt that an offence has been committed under section 72(1) of the 2004 Act. It was Ms Dodds' submission that in the circumstances the tribunal could not be satisfied beyond reasonable doubt that an offence had been committed.
17. Section 72(1) of the 2004 Act provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed but is not. It was common ground between the parties that the Property is a "house in multiple occupation" ("**HMO**") requiring to be licensed under section 61 of the 2004 Act by reason of an additional licensing scheme which exists in the borough of Lewisham.
18. Ms Dodds submitted that there are a number of defences in section 72. Under section 72(5) of the 2004 Act a person will have a defence if he had reasonable excuse for failing to licence the Property. It was Ms Dodd's submission that at all material times the respondent had a reasonable excuse for its failure to license the property; namely that Lewisham council had not notified the respondent or its agents that it was introducing a licensing scheme in addition to the mandatory scheme.
19. The tribunal heard evidence from Ms Powers, the respondent's managing agent, that the Property was let to four tenants, of whom one was the applicant, on 1 March 2018. A letting to four non-related persons does not require a mandatory HMO. Lewisham had introduced an additional licensing scheme on 11 February 2017, requiring a letting to be licensed as an HMO if it was a property over commercial premises, and if the letting was to three or more persons forming two or more non-related households who share facilities. The Property is above commercial premises. Ms Powers was unaware of the additional licensing requirement until December 2017, when she was shown a letter (not addressed to her company or to the respondent) dated 1 December 2017 which referred to HMO licencing within the borough. Ms Powers gave evidence that from 7 December 2017 she endeavoured to establish from the council whether the additional licensing scheme affected any of the properties that she managed in Lewisham, including the Property. Ms Powers received no response from Lewisham until 4 April 2019 when the respondent received a notice under section 61 of the 2004 Act informing it that an HMO application should be made by 6 May 2019. Ms Dodds submitted that the respondent had a reasonable excuse for failing to licence the property; namely that Lewisham council had not notified the respondent or its agents that it was introducing the additional licensing scheme and had failed to respond to Ms Power's enquiries.
20. The tribunal heard evidence from Mr Blaise Macklin, a member of the Private Sector Housing Agency of Lewisham Council, that the introduction of the additional licensing scheme had been advertised throughout the borough,

including posters in Lewisham High Street and sent to managing agents. The applicant, Ms Podmore submitted that a professional managing agent should have been more proactive and undertaken more research; that there had been a long delay after December 2017 before they had taken any action.

21. The tribunal is satisfied beyond reasonable doubt that the respondent has committed an offence under section 72(1) of the 2004 Act and does not consider that the respondent had a reasonable excuse for committing the offence. There is no obligation on Lewisham to notify each person individually of its additional licensing scheme. The notification requirements set out in The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 do not require this, and Ms Dodds has not submitted that these publication requirements of these regulation had not been met.

From Mr Macklin's evidence it is clear that the scheme was advertised. From Ms Power's evidence it is clear that the respondent, through its agent, was aware of the possibility of the additional licensing scheme before the letting to the applicant on 1 March 2018. The tribunal do not consider that Ms Powers, as a professional managing agent, took sufficient steps to satisfy herself that the scheme did not apply to the Property, which she should have done once she was on notice of the possibility of the additional licensing scheme. For example, although she ultimately made the licensing application on-line she apparently had made no attempt to go on line to Lewisham's Council's website to clarify the position, but this would have been an option open to her. Failure by Lewisham to reply to phone calls and e mails is not a sufficient reasonable excuse. Effectively Ms Powers did nothing between December 2017 and April 2019.

The period during which the offence existed

22. It was common ground between the parties that until 2 May 2019 the respondent had not applied for an HMO licence.
23. Under section 72(4) of the 2004 Act a person has a defence if, at the material time, an application for a licence had been duly made under section 63 of the 2004 Act, provided that the application is still effective. On 2 May 2019 the respondent had made an online application for an HMO licence. The tribunal heard that there had been some difficulty in paying the requisite fee before 6 May 2019 (the deadline for submitting the application put to the respondent in the notice served on it under section 61 of the 2004 Act), due to circumstances outside the respondent's control. Ms Dodds submitted that the respondent had "duly made" the application on 2 May 2019 and that the applicant is unable to seek a RRO in respect of the period after 2 May 2019.
24. The tribunal accepts that the application was duly made on 2 May 2019 and that the applicant cannot seek an RRO in respect of the period after 2 May 2019.

The tribunal's discretion in making an RRO

25. Under section 43(1) of the 2016 Act the tribunal may make an RRO; it is not required to do so. In the circumstances of this case, in particular the failure of a professional managing agent to satisfy itself that the additional licencing scheme did or did not apply to the Property the tribunal consider that it is appropriate to make an RRO.

The rent in respect of which the RRO can be made.

26. The amount of a RRO which the tribunal has decided to make is determined in accordance with section 44 of the 2016 Act. In this application, by section 44(2), the amount must relate to a period not exceeding twelve months during which the landlord committed the offence. And by section 44(3) the amount which the landlord may be required to repay must not exceed the rent paid in that period.
27. Ms Dodds drew the tribunal's attention to the dates upon which Ms Podmore had paid her rent; in particular that the rent for May 2019 was not paid until 3 May 2019; after the application for the HMO licence had been duly made.
28. The tribunal have accepted that the respondent's application was duly made on 2 May 2019. It notes Ms Podmore's submission that she did not consider it fair that the offence ceases on the date of the application is made and that the respondent should have acted more promptly. However, the tribunal having decided that the application was duly made on 2 May 2019, the offence ceases, by statute, on that date. As to the promptness of the respondent's action, that goes to the conduct of the respondent which is further considered below.
29. The applicant's application is dated 19 June 2019. By section 41(2) of the 2016 Act a tenant may only apply for a RRO if the offence was committed in the period of twelve months' ending on the day when the application was made. The applicant initially submitted that if she was not able to recover rent under an RRO after 2 May 2019 she wished to include in her application the rent that she had paid for May and June 2018, but during the hearing she accepted that by reason of section 41(2) she was not able to do so. The tribunal did not have the date of payment of the rent for June 2018 before it but there was no evidence that this had not been paid by 19 June 2018. Ms Dodds submitted that as the June 2018 rent had been paid before the application was made it could not be brought into account; referring the tribunal to the decision in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and anor* [2015] UKSC 72 as authority for the proposition that rent paid in advance is not apportionable over the period to which it relates.
30. Accordingly RRO can only be in respect of rent paid in the period from 20 June 2018 to 2 May 2019. This means that the maximum amount that could be the subject of the RRO is £625 per month for the months July 2018 to February 2019 (£5,000) and £637.50 per month for the months March 2019 to April 2019 (£1,275), in total £6,275.

The amount of the RRO

31. Ms Dodds submitted that in determining the amount the respondent might be required to repay the tribunal should have regard to section 44(4) of the 2016 Act, which requires the tribunal to have regard, in particular, to the conduct of the landlord and the tenant, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of an offence to which the relevant chapter of the 2016 Act applies.
32. The tribunal heard evidence that the landlord had not at any time been convicted of an offence to which the relevant chapter of the 2016 Act applied.
33. Ms Dodds referred the tribunal to the decision in *Fallon v Wilson and others* [2014]UKUT0300 (LC) (“**Fallon**”) which, while relating to a RRO under the 2004 Act, is in respect of similar statutory wording to that of the 2016 Act. In *Fallon* the Upper Tribunal held that in calculating the appropriate RRO the tribunal should have regard to the outgoings of the Property that the landlord paid out of the rent. It applied the approach adopted in *Parker v Waller* [2012] UKUT 301 (LC) (“**Parker**”) at paragraph 42 of that decision, “it would not be appropriate to impose upon [Mr Parker] an RRO amount that exceeded his profit in the relevant period”.
34. The tribunal had in front of it evidence from the respondent of various outgoings incurred by it in respect of the Property during the period from 8 August 2018 to 3 June 2019. These totalled £5,328.12. As the RRO period expired on 2 May 2019 no expenditure incurred by the landlord after that date should be taken into account. That reduces the relevant landlord expenditure to £3,004 in respect of the whole Property. The tribunal determine that one quarter, £751, should be deducted from the maximum possible amount of the RRO, thereby reducing the total maximum rent the possible subject of an RRO to £5,524.
35. Insofar as the conduct of the tenant and the landlord are concerned the tribunal heard submissions from the applicant as to the possible non-compliance by the landlord of certain HMO licence conditions in general without any corroborating evidence. It also heard submissions from the applicant as to the lack of prompt response by the respondent when it first learnt that an HMO licence might be required for the Property, and also as to the lack of speed with which the respondent made the HMO licence application following receipt of the section 61 notice.

From the respondent the tribunal heard evidence as to late payment of rent from time to time by the tenant. It also heard submissions from Ms Dodds that the tenants of the Property were never at risk of harm, or suffered loss, by reason of the respondent’s failure to licence; that the Property had always been well maintained and that the breach was of an additional rather than mandatory scheme. She also submitted that it might be relevant for the tribunal to have regard to the fact that if the council had imposed a civil penalty it would be have been £2,500.

36. While the imposition of a civil penalty would be relevant to the landlord's financial circumstances if it had been made, no such penalty was imposed, and the tribunal do not consider that the possible sum referred to by Ms Dodds is relevant to its decision in this application.
37. The tribunal note that save for the failure to establish the necessity to apply for an HMO licence there is no substantiated evidence against the conduct of the landlord. It also notes that none of the other tenants have made applications for an RRO. However in *Fallon* the Upper Tribunal referred to the distinction adopted in *Parker* between a landlord who is engaged professionally in letting and a non-professional landlord; with the former likely to be more harshly dealt with. In her witness statement Ms Powers expressly referred to the respondent as "a professional Landlord". The tribunal further note that Ms Powers took little action to establish the actual position with regard to the need for an HMO licence between December 2017 and April 2019, and then only made the application to licence the HMO at the last possible date. It considers that this is conduct of the landlord to be taken into account when determining the amount of the RRO.
38. Taking into account the conduct of the parties the tribunal determines that the respondent should be required to repay to the applicant by way of RRO the sum of £4,143.

Name: Judge Pittaway

Date: 17 December 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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. 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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of Relevant Legislation

Housing Act 2004

56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either -

- (a) the area of their district, or
- (b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

61 Requirement for HMOs to be licensed

(1) Every HMO to which this Part applies must be licensed under this Part unless—

(a) a temporary exemption notice is in force in relation to it under section 62, or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

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,

73 Other consequences of operating unlicensed HMOs: rent repayment orders

(1) For the purposes of this section an HMO is an "unlicensed HMO" if—

(a) it is required to be licensed under this Part but is not so licensed, and

(b) neither of the conditions in subsection (2) is satisfied.

(2) The conditions are—

(a) that a notification has been duly given in respect of the HMO under section 62(1) and that notification is still effective (as defined by section 72(8));

(b) that an application for a licence has been duly made in respect of the HMO under section 63 and that application is still effective (as so defined).

254 Meaning of "house in multiple occupation"

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—

- (a) it meets the conditions in subsection (2) (“the standard test”);
- (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
- (c) it meets the conditions in subsection (4) (“the converted building test”);
- (d) an HMO declaration is in force in respect of it under section 255; or
- (e) it is a converted block of flats to which section 257 applies.

(2) 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.

The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006

9. Publication requirements relating to designations under Part 2 or 3 of the Act

9.—(1) A local housing authority that is required under section 59(2) or 83(2) of the Act to publish a notice of a designation of an area for the purpose of Part 2 or 3 of the Act must do so in the manner prescribed by paragraph (2).

(2) Within 7 days after the date on which the designation was confirmed or made the local housing authority must –

- (a) place the notice on a public notice board at one or more municipal buildings within the designated area, or if there are no such buildings within the designated area, at the closest of such buildings situated outside the designated area;
- (b) publish the notice on the authority's internet site; and
- (c) arrange for its publication in at least two local newspapers circulating in or around the designated area— (i) in the next edition of those newspapers; and (ii) five times in the editions of those newspapers following the edition in which it is first published, with the interval between each publication being no less than two weeks and no more than three weeks.

Housing and Planning Act 2016

40 Introduction and key definitions

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

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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).

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 –
- the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - 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 –
- the offence relates to housing in the authority’s area, and
 - 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.

43 Making of a 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 had 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 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).

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 this table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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 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,
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.