FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UC/HMF/2020/0037
Property	**:**	14A West Street, Bognor Regis, West Sussex PO21 1UF
Applicant	**:**	Anna Nocula-Giza
Representative	**:**	-
Respondent	**:**	Magdalena Holubowska
Representative	**:**	-
Type of Application	**:**	Application by tenant for rent repayment order: sections 40-46 Housing and Planning Act 2016
Tribunal Members	**:**	Judge E Morrison Mr M Woodrow MRICS Mr M R Jenkinson
Date of Hearing	**:**	16 March 2021 (by video)
Date of decision	**:**	19 March 2021

DECISION

The application

1. By an application dated 20 November 2020 the Applicant tenant applied for a rent repayment order ("RRO") against the Respondent landlord on the ground that the Respondent had committed an offence under section 72 of the Housing Act 2004 (control or management of unlicensed HMO).

The law and jurisdiction

2. The relevant provisions relating to rent repayment orders are set out in sections 40 -46 Housing and Planning Act 2016 ("the Act"), reproduced in full in the Appendix to this Decision.

3. Section 41 permits a tenant to apply to the First-tier Tribunal for a RRO against a person who has committed a specified offence, including the offence mentioned at paragraph 1 above, if the offence relates to housing rented by the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made.

4. Under section 43, the Tribunal may only make a RRO if satisfied, beyond reasonable doubt, that the landlord has committed a specified offence.

5. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, section 44 relates to the amount of a RRO. Where an offence under section 72 of the Housing Act 2004 has been committed, the amount must relate to a period, not exceeding 12 months, during which the landlord was committing an offence. It must not exceed the amount of rent paid less any universal credit paid in respect of the rent. In determining the amount of a RRO the tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant (b) the financial circumstances of the landlord.

Procedural background

6. On receipt of the application the Tribunal issued Directions, which required the Applicant to provide further evidence, and for the Respondent to send a statement of case and evidence in response by 12 February 2021. The Applicant complied. On 11 February 2021 the Respondent emailed the Tribunal, briefly explaining her position with respect to the application. A case officer responded suggesting she obtain legal advice, and enclosing an application form in the event that the Respondent wished to ask for more time. This advice was repeated on 16 February 2021 but nothing further was heard from the Respondent until the hearing.

7. Both the Applicant and the Respondent attended the hearing, acting in person. Although neither party's first language is English (they are both from Poland), they both speak English to a good level, and the Tribunal made sure that the Respondent had understood the application and paperwork sent to her, and were satisfied that she did. The Respondent wanted the Tribunal to rely on her email of 11 February 2021; in effect that was her statement of case. She did not seek to add to this or provide any documentation. The Applicant saw the email for the first time at the hearing. Having read it, she confirmed that she was willing to proceed with the case and did not request an adjournment.

The Applicant's case

8. The Applicant had provided a witness statement, which she expanded upon in her oral evidence.

9. The Applicant said that 14A West Street is a self-contained flat over the first and second floors of a building; there is another wholly separate flat on the ground floor. The lower floor of 14A comprises a kitchen, and a living room that was used as a double bedroom. Upstairs there were two more double bedrooms, a bathroom, and a single bedroom which was the room occupied by the Applicant.

10. She moved into the property on 30 April 2020 and moved out on 27 September 2020. There was no written tenancy agreement. The Respondent was the landlord and they verbally agreed the rent, which could be either £80.00 per week or £320.00 per calendar month. The gas and electricity required prepayment on a card, and if the Applicant put money on the card, this could be deducted from the rent. The Applicant produced bank statements showing that she paid a total of £1480.00 to the Respondent in rent.

11. When the Applicant moved in, the only other occupants were two other Polish women who shared the lower floor bedroom. Within three days of moving in, four more people moved in, using the other two bedrooms on the upper floor. From that point onwards, the number of occupiers never fell below five. People came and went; the longest period of no change was when a family, who she thought were Bulgarian, comprising a couple, two children and a grandfather, occupied the other two upstairs rooms. They were not related to the Applicant or the women in the lower bedroom.

12. The Applicant submitted that 14A West Street was a HMO being managed by the Respondent without the necessary licence. No-one else was involved. Rent was paid to the Respondent and she was the only person to contact if anything e.g. a new light bulb, was needed. She did not know if the Applicant owned the flat, but assumed she did not because when she asked the Respondent if a lock could be fitted on the door of her room, the Respondent said that "the agency" did not approve this.

13. The evidence from the local authority, Arun District Council, consisted of an email from an employee Chantelle Bashford dated 28 September 2020, which stated she had inspected the property "last week", one issue identified "being that the property is operating as an unlicensed House in Multiple Occupation (HMO) as suspected". On 10 March 2021 Ms Bashford sent the Applicant a further email stating that the Council had decided to commence a prosecution against the Respondent "for her role in operating a licensable House in Multiple Occupation without a valid licence".

14. The Applicant sought repayment of all the rent she had paid, and for reimbursement of the Tribunal fees of £300.00.

The Respondent's case

15. The Respondent's email of 11 February 2021 reads as follows:

I got your letter about 14 west street but I wasn't in Uk three weeks so I did know that I have to contact with you.

I would like to explain that I was guarantor for my friend with this property. When he lost his job in first lockdown he decide to go back to his country and I was in panic Becouse I didint have money to pay his rent/ I'm single mum without any money in first lockdown too/ . One thing what I could do it was rent out to someone, this Polish girls they ask me in COVID time that they are living with 12 people in one house with one bath and if I can rent rooms them. Becouse property was empty I said / yes. I didint have money to pay my rent, bills and even food and cover another rent. They ask if I can help them during lockdown Becouse was difficult to get property. Even they move out and half furniture was stolen either them and I did know when. I did know that I'm doing something wrong. I'm single mum with 3 kids at home and in COVID time I wasn't with any money plus I got a lot of debt. I hope you can understand my position. Yours Sinceraly. Magdalena Holubowska

16. At the hearing the Respondent expanded upon this. She said that a Romanian friend had rented the flat from 10 January 2020 for six months. She had agreed to be a guarantor under the tenancy agreement. The friend lived at the property with three others from Romania, all working as builders, but when they lost their jobs as a result of the Covid lockdown all four left the UK. This left the Respondent liable for the rent, which she said was £1050.00 per month. When the Tribunal asked to see a copy of the tenancy agreement, the Respondent said she didn't have one. She did not know who owned the property.

17. The Respondent said she panicked and decided to rent the flat out

herself. She advertised on Facebook. She accepted what the Applicant had told the Tribunal about the occupiers and that she did not have, or apply for, a HMO licence. She said that she paid the rent for the flat from March 2020 onwards until she gave up the flat on 8 October 2020, and that she also paid the Council Tax and water bills.

18. The Respondent said she made no profit as the rent received from the occupiers did not cover the rent and other bills she had to pay. She agreed that the Applicant paid rent to her of £320.00 per month, and said that others (excluding children) paid £60.00 per week per person although less was paid for the Bulgarian grandfather. Some of the rent was paid to her by bank transfer, some in cash. She had no written records.

19. The Tribunal pointed out that the Respondent's maximum liability as a guarantor was for four month's rent which, on her case, was £4200.00. The tenancy could have been ended in July 2020; instead the Respondent chose to continue it. The Respondent said she kept running the tenancy to try to recoup her expenditure. She accepted that the Council Tax bill was not in her name.

20. The Applicant asked the Respondent if 14A West Street was the only property she was managing as a HMO. The Respondent said that prior to her divorce three years ago, she and her ex-husband ran a business together in Bognor renting out properties. She was aware that the rules on HMO licensing had changed since then.

21. The Respondent said she was a single mother renting a house from a friend, where she lived with her three children. The rent on her house is £800.00 per month, but when asked for the tenancy agreement, she said she didn't know where it was. Asked about her income, she said that she works part-time in a greenhouse earning £150.00 per week. She also receives child benefit of £195.00 per month, and £300.00 maintenance. She has not applied for any other state benefits. She said she has only one bank account which has around £7000.00 in it, from the proceeds of a house she and her ex-husband sold in Poland. The Tribunal asked if she wanted to support her evidence by showing the Tribunal a screen shot of her bank statement, but she said she did not want to do this. The Respondent said she owned no properties.

22. The Respondent did not think the Tribunal should make an RRO because the Applicant had lived in the room. If a RRO was made, she would only be able to pay it in small instalments.

Discussion and determination

23. The first question for this Tribunal is whether the Respondent, as a landlord, has committed a specified offence.

24. Although there is no evidence that the Respondent was entitled to sub-let the rooms at the property, there is no doubt that she did so, and thereby assumed the status of landlord as regards the Applicant and other persons living in the flat. A person can grant a tenancy without having an interest in the property: *Bruton v London &*

Quadrant [2000] 1 AC 406.

25. Under section 72(1) of the Housing Act 2004 a person commits an offence if he is a person having control or managing an HMO which is required to be licensed but is not licensed. Under section 72(4) it will be a defence if, at the material time, an application for a licence had been made and was still effective. Section 72(5) provides for a defence of reasonable excuse.

26. Since 1 October 2018 a HMO, as defined in section 254 of the Act, requires a licence if it is occupied by five or more persons living in two or more households.

26. Section 263 of the Act defines "person having control" and "person managing". Put briefly, as it applies here, a person having control means the person who receives the rack rent, which is essentially the market rent. A person managing means a person, who being an owner or lessee of the premises, receives the rents from the HMO occupiers. The Respondent is not an owner or lessee of the premises and therefore cannot be a "person managing" but she does fall within the definition of a "person having control" for the purposes of section 72.

27. The Respondent has not challenged the Applicant's evidence as to the number of occupiers and households at the property, and does not deny that there was no licence. Although the Applicant was not able to provide the Tribunal with the names of the other occupiers and their dates of occupation, the Tribunal finds the Applicant to be an honest and reliable witness and accepts her evidence that, as from three days after she moved in, the flat was occupied by at least five persons living as two or more households. The Respondent has not put forward anything which might amount to a defence of reasonable excuse. The Tribunal is satisfied beyond a reasonable doubt that the Respondent committed an offence under section 72(1) of the Act between 3 May 2020 and 27 September 2020.

28. The next issue is whether to make a RRO, and if so, for what amount. The Respondent's suggestion that the Applicant should not get a RRO because she enjoyed the benefit of living at the property is not accepted. The purpose of a RRO is not to compensate the tenant, but to penalise and discourage landlords who break the law. The Tribunal sees no reason why an RRO should not be made against the Respondent.

29. In deciding how much to order, section 44 of the Act requires the Tribunal to take particular account of the conduct of the parties, and the landlord's financial circumstances, and whether the landlord has been convicted of the relevant offence. The Respondent has not been convicted and therefore issues of double penalties do not arise. There is nothing in the Applicant's conduct which would militate against awarding a RRO for the full amount of rent paid in respect of the period during which the offence was committed.

30. As regards the landlord's conduct, in the view of the Tribunal the Respondent's actions have been, at best, highly irresponsible. She decided to rent out rooms at the flat without having any apparent

authority to do so. No written tenancy agreements were provided. She had prior experience of renting properties but produced no evidence that she did anything at all in terms of complying with the legal requirements placed on all landlords e.g. in respect of gas safety. She provided the Tribunal with a narrative, seeking sympathy, but chose not to provide a single item of written evidence to support anything that she said. The Tribunal does not believe that the Respondent let out rooms in a panic and only wanted to cover the outgoings. A reasonable person who found themselves liable for four months' rent as a guarantor would have mitigated their loss by asking the head landlord/ agent to re-let, and, if that didn't work, by ending the tenancy at the first opportunity at the end of the initial 6- month term. Instead she saw the property as an opportunity to make money, and only gave it up shortly after the Council discovered it was an unlicensed HMO.

31. With respect to her financial circumstances, again there is no paperwork to corroborate anything the Respondent said. We believe the Respondent made an informed decision not to produce any written evidence, presumably because she did not think it would assist her. If the Tribunal believed that she had paid water bills and council tax attributable to the period of the Applicant's occupation, a deduction could be made in calculating the amount of the RRO: *Vadamalayan v Stewart* [2020]. However, the Tribunal is simply unable to accept the Respondent's unsupported assertions about payment of these outgoings. The Respondent also says that she paid rent of £1050.00 per month to the person who had granted the tenancy agreement to her friend in the first place. There are no decided cases on the specific issue of whether rent paid *by* a landlord should be deducted. However, in *Vadamalayan* Judge Cooke said, at paragraph 14:

…[U]nder the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profit. That principle should no longer be applied.

In that case, mortgage payments made by the landlord were disallowed as a deduction. There is an argument that rent paid by the landlord, being the price paid to secure the accommodation, should be treated in the same way, contrasting with utilities that arise directly as a result of occupation. But even if that is wrong, and rent paid by a landlord is potentially deductible from a RRO, the Respondent has failed to produce any evidence of payment and we are not prepared to accept her oral evidence alone because we have doubts about her credibility.

32. As to the Respondent's current financial circumstances, we do not accept her uncorroborated evidence that she has total income of about £1100.00 per month, has three children, pays rent of £800.00 and yet does not claim benefits. It is telling that she did not want to show the

Tribunal her bank statement. But even on her own evidence she has money in the bank which is available to meet the RRO.

33. Taking all the circumstances into account, the Tribunal makes a rent repayment order in the sum of £1448.00, being the full amount of rent paid by the Applicant for the period the offence was being committed. This is £32.00 less than the sum requested by the Applicant to take account of the first three days when only three persons were living at the property. The sum of £1448.00 is to be paid by the Respondent to the Applicant by 16 April 2021.

34. The Tribunal also orders the Respondent to reimburse to the Applicant the Tribunal fees she has paid in the sum of £300.00, again by 16 April 2021.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Sections 40 – 46 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 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).

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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—
(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,
(b) state the amount that the authority seeks to recover, and
(c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

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).

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.

45 Amount of order: local housing authorities

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a local housing authority, the amount is to be determined in accordance with this section.

(2) The amount must relate to universal credit paid during the period mentioned in the table.

In the order is made on the ground that the landlord has committed	***the amount must relate to universal credit paid 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 the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period.

(4) In determining the amount the tribunal must, in particular, take into account—
(a) the conduct of the landlord,
(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.

46 Amount of order following conviction

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order—
(a) is made against a landlord who has been convicted of the offence, or
(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made—
(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
(b) in favour of a local housing authority.

(4) For the purposes of subsection (2)(b) there is *"no prospect of appeal"* , in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.