



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

Case Reference : **MAN/00EJ/HMK/2018/0010**

Property : **24 Nevilledale Terrace Durham DH1 4QG**

Applicants : **Mr James Brader
Mr Sam Clague
Mr Luke Rose
Mr Magnus Burgess-Smith
Mr Thomas Oliver
Mr Zak Baydur**

C/o Richard Brader

Respondent : **Mrs Gabrielle Moore**

Type of Application : **Application for Rent Repayment Orders
under s41 Housing and Planning Act 2016
(the "Act")**

Tribunal Members : **Tribunal Judge Brown
Mr IR Harris, MBE FRICS**

Date of Decision : **29 January 2019**

DECISION

The Tribunal orders rent repayment of £6,513.75, equivalent to £1,085.62 per Applicant.

Introduction

1. The Applicants made application on 24 July 2018 to the Tribunal claiming a rent repayment order against the Respondent relying upon alleged commission of the offence of failing to licence a house in multiple occupation contrary to s72(1) Housing Act 2004 (the 2004 Act).
2. The Tribunal issued Directions on 30 August 2018 and as neither party requested a hearing the Tribunal proceeded to make its determination following inspection of the Property and by reference to the papers and written representations.
3. The Applicants were assured shorthold tenants of the Property pursuant to a tenancy agreement with the Respondent for a term of 12 months commencing 1 July 2017 at a rent of £2,730.00 per calendar month.
4. The Applicants claimed in the Application repayment of £455 per month per tenant (being 6 in number) for 11 months to 30 June 2018 (accepting that the first month was outside the 12 month period for which repayment could be claimed), amounting to £5,005 per tenant, £30,030 in total.

Issues

5. The Applicants asserted that the Respondent had let the Property as a house in multiple occupation (HMO) without a licence granted by the local authority contrary to section 72(1) of the 2004 Act. The issue of what would comprise a HMO for the Property was not in dispute, in that for the relevant time it would comprise at least 3-storeys with 5 or more occupants sharing facilities.
6. The Respondent had not been prosecuted for the alleged offence and therefore the first issue for the Tribunal to determine was whether it was satisfied beyond reasonable doubt in accordance with Section 43 of the Act that the Respondent as landlord had committed the offence of letting the Property as an unlicensed HMO for the period of occupation by the Applicants. Secondly, if so satisfied, to decide if it is satisfied that a rent repayment order should be made and what sum is repayable and for what period.

Inspection

7. The Tribunal inspected the Property on 14 November 2018. It is a three storey terraced house of brick and tile construction with single storey extension. It has been modernised and fitted with gas central heating and double glazing.
8. On the ground floor is a dining kitchen, with sitting comprising four dining chairs and a two-seater sofa. There is one bedroom to the front and one to the rear and two bathrooms. Located across a half landing and the first floor are four bedrooms and a bathroom. On the 2nd floor is a bedroom, which we will refer to as the "attic room". All rooms appeared to be in reasonable condition

Statutory Framework

9. This is an application under the Housing and Planning Act 2016 (the Act) which provides at chapter 2 a scheme of arrangement for rent repayment orders. The introductory section 40 states:

(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.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the 2004 Act: “control of unlicensed house”.

10. Section 41 of Act entitles a tenant to apply for a rent repayment order against a person who has committed an offence to which this Chapter applies.
11. However, by subsection (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.*
12. Section 43 of the Act then gives the First tier Tribunal the power to make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

The section then specifically provides in relation to an application by a tenant

(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).

13. Section 44 of the Act then directs the First-tier Tribunal when considering an application for such an order the amount payable is to be determined in accordance with this section and at subsection 2 that the amount must relate to rent paid during the period mentioned in the table set out in that subsection. The table prescribes that for an offence mentioned in row 5,..... of the table in section 40(3) 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.

14. Section 44(3)&(4) then give directions regarding the issues to be considered by the Tribunal when deciding an application for a rent repayment order as follows:

(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.

15. Section 46 provides that if certain offences are committed the amount of the rent repayment order must be the maximum which the Tribunal has power to award but in this case the relevant offence is not one of the prescribed offences and nor has a conviction occurred.

16. Section 72 of the 2004 Act states:

(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.

Representations

18. The Applicants' case was that there was one bedroom on the top (3rd) floor of the Property (the attic room), which initially they were asked not to use but which became occupied and comprised a sixth bedroom. It was fitted as a bedroom and in lettings particulars had been so described. The availability and use of the attic room as a bedroom made the letting of the Property a HMO. There was no HMO licence and the Planning Inspectorate had rejected an appeal by the Respondent when it had refused to permit the Property to be a HMO.
19. They noted for the Tribunal that the lounge on the ground floor became used as an additional bedroom from 29 November 2017, as the ground floor bedroom at the rear of the property became uninhabitable due to mould.
20. The Respondent asserted that she had been informed by the local authority that that so long as the attic room was not let as one of the bedrooms the Property did not need a HMO licence. The issue regarding planning was simply that for the Property to be let as a HMO, at some point in time, relevant planning consent was needed.
21. She and her letting agent, Mr Edwards of Stuart Edwards Estate Agents, stated that the Applicants had been told repeatedly before and after signing the tenancy agreement that the attic room was not included in the letting. The Applicants viewed the Property pre-letting when tenants were in residence, in December

2016. One occupied the front downstairs bedroom and another the back (extension) bedroom. The Property's rooms then were 2 bedrooms on the ground floor, plus 2 shower rooms, kitchen/diner/living room, one large room at the back of the Property and 4 bedrooms on the first floor plus a shower room.

22. The Respondent stated that the Applicants agreed to let one of the previous tenants (Ibrahim Sayarikin) stay in the Property during the summer before the start of their tenancy. As this person was to be in the Property while possessions of the Applicants were present the Respondent offered to store the Applicants' belongings temporarily in the attic room, which was the only room with a lock and key. They were told their property would have to be moved out when they started to live in the Property. When the Applicants began to reside in the Property she loaned them the key to the attic room so they could take their possessions from it. When she asked for the key back they said they had "lost it".
23. On 9 September 2017, Applicant Mr Clague emailed the Respondent asking about moving furniture and using the attic room. He was told that the room was not for occupation.
24. During the Christmas vacation the Respondent was telephoned by Applicant, Mr Burgess-Smith, requesting access to the Property at short notice to retrieve his passport for a University ski trip. She let him in and found that he went to the attic room, which he was occupying as a bedroom, although it was in a messy state. She stated that he said he had moved into that room when his bedroom had become mouldy and he said, without objection, that he would vacate the attic after vacation. He said that he did not know where that room key was.
25. Later, after report of a problem with the electrics at the Property she visited, finding it in a poor state internally. Mr Edwards then inspected the Property and reported that one of the Applicants was using the attic room as a bedroom and he had told the tenants present that this was not acceptable.
26. The Respondent represented regarding the lounge on the ground floor that it was occupied as a bedroom throughout the tenancy.
27. She explained that the Property was left unclean and untidy at ending of the tenancy incurring her in expense to bring it back into a lettable condition.

Decision

28. The Tribunal first had to determine if it was satisfied beyond a reasonable doubt that the Respondent had committed the offence of letting the Property without a HMO licence when one was required. It was not disputed that a licence was required if the Property was a HMO, nor was it in doubt that for the relevant period of the letting the occupiers shared facilities and comprised more than 5 unrelated persons. The issue was whether the attic room was included in the letting, making a bedroom on each of 3 floors.

29. We saw the letting particulars, which referred to six bedrooms and a lounge (which we understood to mean the living space at the front of the Property on the ground floor, that we find did become occupied as a bedroom). We saw on inspection that the Property comprises three floors and we saw the attic room, which still appeared fitted out as a bedroom – in effect making 7 possible bedrooms. The attic room is the sole room on that top floor. The Respondent's statement regarding how and when that room came to be used was credible. It first was used to store possessions during the term of the tenancy, while Ibrahim Sayarikin was occupying the Property, before the Applicants moved in. While it was a lockable room, upon the Applicants taking up occupation it was not re-locked because the key went missing. It was not relocked at any time thereafter. It was occupied by Mr Burgess-Smith as a bedroom and that was known to the Respondent from the time of the University Christmas vacation 2017 when she allowed that Applicant into the Property to collect his passport. The Respondent's own recollection was that there were requests for the Applicants to stop using the attic room as a bedroom. However, no action was taken to secure the door to the bedroom and upon the Applicants leaving the Property at the end of the tenancy the poor condition of the Property, including the attic room, was described.
30. In light of the information in the previous paragraph we find that the attic room was occupied as a bedroom from at least December 2017 and remained available for access as such until the end of the tenancy. The effect is that at least one of the six occupiers used a bedroom on the 2nd floor of the Property and the others used bedrooms on the ground and first floors. It therefore must follow that the Property met the definition of a HMO for the period from December 2017 to 30 June 2018 in that it comprised in that time at least 3-storeys with 5 or more occupants sharing facilities. It is not disputed that no appropriate licence was in place. Therefore, we must find that beyond reasonable doubt the Respondent committed the offence referred to in paragraph 5.
31. Accordingly, the Tribunal has the power to make a rent repayment order, but it must take into account the conduct of the parties and the financial circumstances of the landlord (s44(4) 2016 Act).
32. The 2004 Act provided at s 74(5) that the amount to be repaid in a case such as this was such amount which the Tribunal considered reasonable. S74(6)(d) provides that the conduct and financial circumstances of the appropriate person among other matters set out in subsection 6 must be taken into account in determining what sum is reasonable. The two notable cases on rent repayment orders under the 2004 Act namely *Parker v Waller* [2012] 301 UKUT(LC) and *Fallon v Wilson* [2014] UKUT (LC) gave guidance as to the exercise of discretion by the Tribunal in deciding upon the reasonableness of the amount to be repaid. In *Fallon* HH Judge Huskinson said when allowing an appeal in which the First-tier Tribunal had not exercised its discretion properly

"In Parker v Waller it is stated in paragraph 26(ii) that there is no presumption a 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 RPT must take an overall view of the circumstances determining what amount would be reasonable". This I find the Tribunal failed to do."

33. The Act does not include an equivalent provision to s75(5) but the same or substantially equivalent words are used in s74(6)(d) as in s44(4)(a) & (b) of the 2016 Act.
34. Also the Act directs the Tribunal to have regard to the conduct of the tenants Applicants).
35. As this is a case which is not subject to a mandatory maximum repayment the Tribunal will exercise its discretion when determining what sum is repayable in accordance with the statutory framework but with the benefit of the approach adopted by the Upper Tribunal in the cases mentioned.
36. The Tribunal was satisfied the Property was let in reasonable condition with good fittings. It was also satisfied the Respondent who is generally familiar with the licensing regime was generally conducting herself in a way which provided the Applicants with a decent home properly maintained and equipped.
37. The Applicants had the benefit of decent accommodation for their period of occupation. They make no complaints about the Respondent's behaviour. The Tribunal is satisfied that the Respondent had conducted herself well in relation to the Property and her tenants apart from the failure to obtain a licence. There is little evidence of the Respondent's financial circumstances, although she incurred undefined expenses relating to its maintenance and upkeep and had to clean the Property thoroughly after the Applicants vacated it, at a cost to her.
38. As far as the period of repayment is concerned the amount payable must relate to the rent paid by the Applicants in respect of a period not exceeding twelve months during which the Respondent was committing the offence. The 2004 Act provides at s 74(8)(b) that the repayment order may not require payment of any amount which is in respect of any time falling outside the period of twelve months ending with the date of the occupier's application under s73(5) of that Act. However, the (2016) Act does not impose such a restriction but specifically provides that the limitation period is defined by reference to the period of occupation while the offence was being committed. In this case the period the Applicants stated that their application related to 11 months to 30 June 2018
39. While a rent repayment order is effectively compensating tenants where a landlord has committed an offence relevant to the letting, it also penalises the landlord. The Tribunal was informed by the Respondent that the full rent for the 12 months of letting ultimately was paid by the Applicants – i.e. £32,760. She incurred mortgage expenses in that period of £11,918.96, making a surplus for her of £20,841.04 (albeit before any other costs or expenses relating to the Property and its letting), equivalent to £1,737 per month. In exercising our discretion, having regard to all the circumstances, we decide that this sum is the appropriate amount (the “applicable amount”) for the making of any rent repayment order for any month at issue to 30 June 2018.
40. We find that in months 1 – 3 of the tenancy the attic room was unlocked, but it does not appear to have become occupied – certainly as a bedroom - until some time before the University Christmas vacation 2017, but was accessible for use. We determine no rent repayment is appropriate before December 2017. Thereafter it was occupied as a bedroom and the Respondent was on notice

personally of that, having accompanied Mr Burgess-Smith to collect his passport. We determine that for the months of October, November and December 2017 a rent repayment order of 25% of the applicable amount should be made ($\pounds 1,737 \times 3 \text{ months} \times 25\% = \pounds 1,302.75$). Despite warning the Applicants that the attic room should not be used, no action was taken by the Respondent to stop use. Therefore, we determine that for the months of January - June 2018 (inclusive) a rent repayment order of 50% of the applicable amount should be made ($\pounds 1,737 \times 6 \text{ months} \times 50\% = \pounds 5,211$).

41. Therefore, the Tribunal orders rent repayment of $\pounds 6,513.75$, equivalent to $\pounds 1,085.62$ per Applicant.

Tribunal Judge W L Brown