



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

Case Reference : **BIR/00CS/HMK/2019/0032**

Subject Property : **98 Cranford Street
Smethwick
B66 2RT**

Applicant : **Ms Naomi Newhill**

Respondent : **Mr Yousaf Usman t/a Pioneer Lettings**

Type of Application : **Rent Repayment Order
Housing and Planning Act 2016**

**Date of Site
Inspection** : **16th October 2019**

Tribunal Judge : **Dr Anthony Verduyn**

Tribunal Member : **Robert Chumley-Roberts MCIEH, J.P**

Date of Decision : **28 October 2019**

DECISION

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, Ms Newhill, is a former tenant of 98 Cranford Street, Smethwick, B66 2AZ (**'the Property'**).
7. By applications dated 20th May 2019 and received by the Tribunal on 5th June 2019, the Applicant applied for a rent repayment order under section 41 of the 2016 Act. She alleged that the Respondent, Mr Yousaf Usman, was controlling or managing the 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.
8. Directions were issued on 21st June 2019 for the Applicant to provide a Statement of Case with copy relevant documents and, no later than 5th August 2019, for the Respondent to do likewise. The Applicant complied, albeit late, with a Statement of Case dated 6th July 2019. The Respondent did not comply at all. By letter dated 8th August 2019, the Respondent was given 7 days to respond or the Tribunal would consider barring him from taking any further part in these proceedings under Rule 9(7)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. For want of any response within the time given, or at all, the Tribunal did consider making a barring order and

on 16th August 2019, applying the Rules, barred the Respondent from taking further part in the proceedings. In fact, not only had the Respondent neglected to take any part to that date, he has never acknowledged or sought to engage in the application at all.

9. The Application and the Applicant's Statement of Case with its appended documents are the only evidence before the Tribunal. They are to the following effect:
10. The Applicant occupied the Property between 1st October 2018 and 9th April 2019. As evidenced by her bank statement, she paid in rent £371.57 on 17th October 2018, followed by 6 monthly payments of £500. The Respondent repaid her £312.52 on 11th April 2019. Hence her rent payments in total amounted to £3,059.05 net. The Applicant states, and the Tribunal finds, that she received no Tenancy Agreement, despite her requests, and she relied on Whatsapp and Messenger to contact the Respondent. This made her uneasy, and that feeling was compounded by the various names under which the Respondent appeared to operate: "Easyrooms", "Fort Moseley Ltd" and "Pioneers Letting". Maintenance was carried out by a relative of the Respondent, Mr Usman. It appeared to the Applicant that the Respondent had no fixed address for his business, and at least once he claimed only to be an agent of the landlord. The tenancy ended after she received notice to quit on 1st April 2019. This prompted her to seek advice from Sandwell Metropolitan Borough Council's housing team and the making of this application on its advice.
11. The Applicant supplemented the details of her application with a timeline for occupation of the Property: when she moved to a room with her partner, Mr Steven Barber, 3 individuals were already in occupation (Bethany, Blessing and Ryan); in January 2019 Ryan and Blessing moved out; and between January and February 2019 Bethany's American partner moved in, along with Vase, and a couple, Sian Aslett and Matthew Sanders; and, in March 2019, one room became vacant. It follows that there were between 5 and 7 people in occupation at the given times, and that they formed at least 2 households. By email of 10th July 2019 from Megan Sieprawska, Sandwell MBC confirmed that the Property was unknown to the HMO Licensing Team, the system's records having been checked.
12. There was no rival evidence from the Respondent, and the Tribunal accepts the undisputed evidence provided by the Applicant.

THE LAW

13. Relevant provisions of the Housing Act 2004

Section 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") [...]

(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.

[...]

(8) In this section–

“basic amenities” means–

(a) a toilet,

(b) personal washing facilities, or

(c) cooking facilities;

[...]

“self-contained flat” means a separate set of premises (whether or not on the same floor)–

(a) which forms part of a building;

(b) either the whole or a material part of which lies above or below some other part of the building; and

(c) in which all three basic amenities are available for the exclusive use of its occupants.

Section 258 HMOs: persons not forming a single household

(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2) Persons are to be regarded as not forming a single household unless–

(a) they are all members of the same family, or

(b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.

(3) For the purposes of subsection (2)(a) a person is a member of the same family as another person if–

(a) those persons are married to each other or live together as husband and wife (or in an equivalent relationship in the case of persons of the same sex);

(b) one of them is a relative of the other; or

(c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

(4) For those purposes–

(a) a “couple” means two persons who are married to each other or otherwise fall within subsection (3)(a);

(b) “relative” means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

- (c) a relationship of the half-blood shall be treated as a relationship of the whole blood; and
- (d) the stepchild of a person shall be treated as his child.
- (5) Regulations under subsection (2)(b) may, in particular, secure that a group of persons are to be regarded as forming a single household only where (as the regulations may require) each member of the group has a prescribed relationship, or at least one of a number of prescribed relationships, to any one or more of the others.
- (6) In subsection (5) “prescribed relationship” means any relationship of a description specified in the regulations.

Section 259 HMOs: persons treated as occupying premises as only or main residence

- (1) This section sets out when persons are to be treated for the purposes of section 254 as occupying a building or part of a building as their only or main residence.
- (2) A person is to be treated as so occupying a building or part of a building if it is occupied by the person—
 - (a) as the person's residence for the purpose of undertaking a full-time course of further or higher education;
 - (b) as a refuge, or
 - (c) in any other circumstances which are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.
- (3) In subsection (2)(b) “refuge” means a building or part of a building managed by a voluntary organisation and used wholly or mainly for the temporary accommodation of persons who have left their homes as a result of—
 - (a) physical violence or mental abuse, or
 - (b) threats of such violence or abuse,
 from persons to whom they are or were married or with whom they are or were co-habiting.

14. 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

15. The Tribunal had directed a paper determination, with which the Applicant had indicated she was content. The Respondent was directed to notify any wish to the contrary when lodging his Statement of Case. He gave no such notice and matters proceeded to a paper determination.
16. The Tribunal inspected the Property on 16th October 2019. Although notices of the intention to inspect were issued to the Applicant and the Respondent by letter dated 19th August 2019, no-one attended the inspection. The Property had all blinds drawn and no-one answered the door. The Tribunal, therefore, carried out a visual inspection from its boundary only. Fortunately, the Property faced the road and the rear was visible from an open parking area. For internal arrangement, the Tribunal had to do its best from the arrangement of windows and the brief description provided by the Applicant in her Application.
17. The property comprises of a detached house constructed in 2018 (Google Street View has it nearly finished in July 2018). It is a brick construction, with full double glazing and a tile roof. Unsurprisingly, its external appearance is of a property in very good condition, with lawn to small front garden area and synthetic lawn and patios to rear. There is no garage, but there is off-road parking to rear. The arrangement of windows suggests that there are three-bedrooms upstairs, with en-suite bathroom to the principal bedroom (which Ms Newhill states was her room) and a shared bathroom. The fourth bedroom would appear to be a downstairs reception room, and there appears to be a shared kitchen/dining area downstairs with additional toilet.
18. There was no visible external evidence for gas central heating, but it is highly likely that some form of central heating was installed at completion of the build of the Property.

DETERMINATION OF THE TRIBUNAL

19. 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 Applicant was entitled to apply to the Tribunal for a rent repayment order.
 - (iii) Whether the Tribunal should exercise its discretion to make a rent repayment order.
 - (iv) Determination of the amounts of any order.

Offence under section 72(1) of the 2004 Act

20. In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord (or even as agent) of the Property, being in control and managing it had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 72(1) of the 2004 Act. This was demonstrated to the satisfaction of the Tribunal by the

unchallenged description of occupation by the Applicant during her period as a tenant, and the absence of an HMO licence as demonstrated by the communication from Sandwell MBC. The “standard test” for a HMO under Section 254 of the 2004 Act was passed in that: the building at the Property consisted of one unit of living accommodation of two storeys; it was occupied by persons who did not form a single household; it was those persons only or main residence; their occupation of the living accommodation constituted the only use of that accommodation; two or more households shared basic amenities (the kitchen and the bathroom, in particular); and. rent was payable. The statutory tests for these various factors were made out on the facts.

Entitlement of the Applicant to apply for a rent repayment order

21. The Tribunal determined that the Applicant was entitled to apply for rent repayment orders 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 Applicants; and the offence was committed in the period of 12 months ending with the day on which the application was made (5th June 2019).
22. Furthermore, the Applicant had demonstrated that she had paid rent, and sought repayment of that rent, fulfilling Section 40(2)(a) of the 2016 Act.

Discretion to make a rent repayment order

23. 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.

Amount of Rent Repayment Order

24. 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 Applicant’s claim satisfies that condition.
25. 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 paid the sum of £3,059.05 net in the period, which happens to encompass the whole term of her tenancy.
26. 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 (not applicable in the present case) whether the landlord has been convicted of any of the offences listed in section 40 of the 2016 Act.
27. 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.

28. 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 RRO [Rent Repayment Order] 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.

29. The Tribunal has these matters in mind, but necessarily has to take a robust approach to the exercise of its discretion in this case. There is simply no information regarding the circumstances of the Respondent because he has failed or refused to participate in the hearing. It follows that there is nothing to mitigate his position. The Tribunal can have regard to the rent paid being inclusive of utility services, but again the failure of the Respondent means that the Tribunal must assess such sum for itself and doing the best it can from its own specialist experience. Considering the whole period of the claim as a little over 6 months, and apportioning estimated utility costs per room, the Tribunal would expect this expense to be in the order of £80 per month, the rent the Respondent received from the Applicant net of such outgoings would be £2,569.60.

30. The Tribunal determines that the full amount of this sum should be repaid under the Rent Repayment Order. Whilst noting that there is no presumption that the total amount is payable, nor, for that matter, the total amount minus utility services, in this case there are clear indicators why the full amount should be payable. Firstly there is the conduct of the Respondent as landlord, in particular his failure to provide the Applicant with any Tenancy Agreement and associated documents, and his failure to provide details of his address as landlord (or the landlord's address if he were an agent) combined with the use of non-geographic methods of communication. Secondly, there is nothing to mitigate the Respondent's conduct, and he has chosen not to engage with the Tribunal at all. Hence, the barring order preventing his participation. The Tribunal was not even afforded access to the Property. This non-participation is within the rights of the Respondent, but cannot be allowed to work to his advantage. Thirdly, there is no criminal sanction because the Respondent has not been prosecuted. Fourthly, there is no other application for a Rent Repayment Order known for the period in question and the period for this claim is now expiring in any event. It follows that there is no reason for the Respondent in these circumstances not to disgorge the net sum that he has received from the Applicant during the period she was in occupation of an unlicensed HMO.
31. There is no relevant misconduct on the part of the Applicant, who seems to have vacated promptly upon notice from the Respondent.
32. The sum of £2,569.60 shall be paid by the Respondent to the Applicant within 28 days of this decision accordingly.

Tribunal Judge Dr Anthony Verduyn

Dated 28th October 2019