FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AC/HMA/2016/0004**
Property	**:**	**26 Parkside Gardens, East Barnet, EN4 8JR**
Applicants	**:**	**Ms Holly Welham** **Ms Tonia Nee** **Ms Julie Adderley** **Ms Helena Mary Collins O'Connor**
Representative	**:**	**Ms H Welham**
Respondent	**:**	**Mr Manzoor Hussain**
Representative	**:**	**Anthony Gold Solicitors**
Type of Application	**:**	**Section 73(5) Housing Act 2004 – rent repayment order**
Tribunal Members	**:**	**Judge John Hewitt** **Mrs Rosemary Turner JP**
Date and venue of Determination	**:**	**30 June 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**27 July 2016**

DECISION

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Decisions of the tribunal

1. The tribunal determines that rent repayment orders shall be made in favour of each of the applicants as follows:

Ms Holly Welham	£1,250.00
Ms Tonia Nee	£1,250.00
Ms Julie Adderley	£1.250.00
Ms Helena Mary Collins O'Connor	£1,250.00

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing files provided to us for use at the hearing.

Procedural background

3. By an application received on 11 April 2016 each of the applicants sought a rent repayment order. The application was made pursuant to section 73(5) of the Act.

4. Each of the applicants has an assured shorthold tenancy of a room within the property and the right to shared use of communal facilities.

5. The respondent is the landlord/freeholder of the property and is the 'appropriate person' for the purposes of the provisions of the Act material to this application.

6. Directions were given. Neither party requested an oral hearing. In accordance with rule 31 we have determined the application on the basis of the papers provided to us.

7. We had before us a file prepared by the applicants. It is sub-divided into several sections and runs to 176 pages. We also had a file prepared by or on behalf of the respondent. It is also sub-divided and runs to 78 pages.

The statutory regime

8. Material to this application are sections 72 – 74 Housing Act 2004. Relevant extracts from those provisions are set out in the schedule to this decision.

9. In summary the Act seeks to improve and regulate the quality of housing stock in the private residential sector. There is a particular focus on properties which are in multiple occupation, as defined to be a House in Multiple Occupation (HMO). Certain HMO's are required to be the subject of a licence issued by the local housing authority (LHA).

10. LHA's are enabled to inspect HMO's to ensure that standards of accommodation are met with a particular focus on health and safety related issues as concern the occupiers.

11. To encourage owners/operators of HMOs to obtain the required licence (and hence subject themselves to the inspection/regulation regime) the Act imposes sanctions where a licence is required but has not been applied for.

12. Those sanctions arise in two ways. The first, by way of section 72(1) of the Act, 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 so licensed. On conviction such a person is liable to a fine. As originally enacted the amount of such a fine was not to exceed £20,000. With effect from 12 March 2015 that cap or limit was abolished, so that the amount of the fine is now unlimited.

13. The second sanction is that tenants of rooms within the HMO and a LHA which has paid housing benefit in respect of rooms within an HMO are entitled to make an application to this tribunal for a rent repayment order. The details are set out in sections 73 and 74 of the Act.

14. Where an application for a rent repayment order is made by the LHA and a tribunal is satisfied that the appropriate person has been convicted of an offence under section 72(1) and that housing benefit was paid during any period which it appears to the tribunal that such an offence was being committed in relation to the HMO the tribunal must make a rent repayment order requiring the appropriate person to pay to the LHA an amount equal to the total amount of housing benefit paid during the period over which the offence was committed. The tribunal has no discretion as to the amount to be specified in the rent repayment order, save in the case of exceptional circumstances as mentioned in section 74(4).

15. Where the application is made by a tenant, a tribunal can award the repayment of rent paid by the tenant in respect of a period whilst the offence is continuing, subject to a maximum period of 12 months prior to the making of the application.

    In these circumstances the amount required to be repaid by way of a rent repayment order *"is to be such amount as the tribunal considers reasonable in the circumstances."* Thus the tribunal has a discretion.

    It should be noted that an offence ceases to be committed when an application for a licence is made to the LHA.

16. To summarise where the application for a rent repayment order is made by a LHA it is entitled as of right to an order for the whole of the amount of housing benefit paid over the period in question. Where the application is made by a tenant he or she is entitled to *"such amount as the tribunal considers reasonable in the circumstances."*

Guidance and the absence of guidance

17. Section 74(6) expressly requires the tribunal to take account the total amount of relevant payments paid and received in connection with occupation of the HMO during the period when an offence was being committed, whether the appropriate person has at any time been convicted of an offence under section 72(1), the conduct and financial circumstances of the appropriate person, and where the application is made by a tenant, the conduct of that tenant.

Judicial guidance as to the manner in which tribunals should approach the exercise of its discretion has been given in two authorities:

***Parker v Waller and ors* [2012] UKUT 301 (LC)**

This is a decision of Mr George Bartlett QC then President of the Upper Tribunal (Lands Chamber).

His guidance may be summarised as follows:

- Conduct on the part of the landlord unrelated to the offence under section 72(1) ought not be taken into account to increase the amount of the rent repayment order that would otherwise be justified;
- Regard may be had to the rental income received by the landlord over the relevant period together with the expenses the landlord may have incurred as regards mortgage repayments, utilities, council tax, repairs and cleaning;
- The degree of culpability of the landlord and his professional status is a factor; and
- The amount of the fine and any costs orders imposed should be taken into account.

In that case the landlord was a professional engaged in the letting of residential property. The President held that the rent repayment orders should be in such amount as equalled 75% of his net profit less the amounts of the fine and the costs order. In that case the amount of the fine and the costs order was a modest £786.

***Fallon v Wilson and ors* [2014] UKUT 0300 (LC)**

This is a decision of Judge Edward Cousins. The judge followed the general approach indicated in *Parker v Waller*. Whilst critical of the approach taken by the tribunal at first instance the judge did not add any new criteria that a tribunal should take into account when exercising its discretion. He remarked that the purpose of the imposition of a rent repayment order is to prevent a landlord from profiting from renting properties illegally. He observed that regard should be had to the total amount the landlord would have to pay by way of the fine and the rent repayment order.

This was another case where the fine was a modest £585 plus a victim surcharge of £15 plus costs of £200.

In the event the judge quashed the rent repayment orders made at first instance on the footing that the tribunal had erred in a number of respects but he did not go on to determine what sum would have been an appropriate sum for the landlord to pay by way of rent repayment orders.

18. We pause to observe that Parliament intended the twin incentives of a substantial fine and a rent repayment order were to encourage landlords to apply for a licence when a licence was required and that if a landlord did not do so there were to be penal consequences. This emphasised by the fact that when enacted the maximum fine was set at £20,000 and that as from March 2015 that cap has been removed so that now there is no maximum.

19. In a serious case where the fine imposed and/or costs awarded are very substantial the effect of deducting the whole amount of the fine plus costs from the net profits will reduce and may even eliminate the net sum of money available to form the basis of a rent repayment order to a tenant. That cannot happen in the case of an application by a LHA because the amount of any fine imposed or costs orders is not to be taken into account.

20. We can see that where the fine is modest deduction of the whole of it may be appropriate and in line with the guidance given but where the fine is substantial that may well not be the case.

21. Plainly Parliament had in mind that the consequences of failure to apply for a licence for an HMO were twofold so that an appropriate person was at risk of both a substantial fine and a significant rent repayment order. There is nothing in the legislation which provides expressly that in relation to an application by a tenant the amount of a fine imposed should be taken into account in assessing the amount of a rent repayment order. In our judgment Parliament did not intend that if a substantial fine was imposed that of itself should limit or impact on a tenant's right to a rent repayment order.

22. We are reinforced in this conclusion by the manner in which a rent repayment order sought by a LHA falls to be dealt with namely, the whole of the housing benefit paid over the material period irrespective of the amount of the fine and any costs orders and irrespective of any costs and expenses incurred by the landlord on the property over that period.

23. So far as we are aware no guidance has yet been given on the approach which a tribunal should take in a case where the fine and costs imposed are substantial so as to have a material effect on the resulting sum when deducted from the net profits earned by a landlord.

24. In these circumstances and bearing in mind the policy of the Act and what Parliament has provided for we find that when weighing the various and competing factors we should have regard to the amount of the fine and costs order but that the whole of that amount should not always be deducted from the net profits if that would result in an inadequate balance from which rent repayment orders can be made. In short we find that a tenant ought not be deprived of his or her right to a rent repayment order simply because magistrates saw fit to impose a substantial fine and/or costs order.

25. We are further reinforced in this approach because in paragraph 21 of the respondent's statement of case [R10] his solicitors say that taking into account the fine and legal costs already paid the respondent has not in fact made any profit from the property over the relevant period. As will be seen below we do not agree that the respondent has not earned a net profit from the property over the relevant period, but that aside, the respondent's solicitors do not submit that in the absence of a net profit the amount of a rent repayment order should be nil. Instead they submit [R13] that the amount of the rent repayment order should be at the lower end of the scale, taking into account:

    1. The fact that the offence occurred as a result of an error by the respondent and not a malicious act;
    2. The costs incurred by the respondent in managing and running the property;
    3. The low level of seriousness of the offence;
    4. The fines already paid;
    5. The fact that the respondent made no profit from the property during the relevant period;
    6. The breaches of agreement by the applicants; and
    7. The respondent's good conduct as a responsible landlord.

The background facts of the subject case

26. There was little dispute about the basic background facts which are material to this application.

27. The subject property is a two-storey, mid-terrace house with a loft conversion which has been adapted to create five bedrooms with shared kitchen, bathroom and toilet amenities, plus a studio flat in the loft conversion.

28. The respondent was registered at Land Registry as the proprietor of the freehold interest on 31 August 2006 [A128]. The price stated to have been paid is recorded as being £285,000.

29. The respondent has subsequently let the rooms in the property to a range of tenants for a range of different rents.

30. The respondent sought and obtained an HMO licence which was issued on 7 March 2008 and which was valid for five years and thus expired on 6 March 2013. The respondent says that the licence was not renewed

by him due to a misunderstanding on his part as to whether or not one of the rooms was deemed to be a self-contained flat.

31. The lettings to the applicants were commenced and renewed as follows:

Ms Holly Welham – first floor front

1 April 2015	12 months	£550 pcm
2 April 2016	6 months	£570 pcm

Ms Tonia Nee – first floor single

29 March 2013	6 months	£338 pcm
1 November 2014	6 months	£351 pcm

Ms Julie Adderley – ground floor rear

26 February 2014	6 months	£528 pcm
27 August 2014	6 months	£528 pcm
28 February 2015	6 months	£528 pcm
28 August 2015	6 months	£528 pcm
29 March 2016	12 months	£538 pcm

Ms Helena Mary Collins O'Connor – ground floor front

24 March 2015	12 months	£559 pcm
30 March 2016	6 months	£559 pcm

32. At Willesden Magistrates Court on 22 March 2016 the respondent pleaded guilty to an offence under section 72(1) of the Act. The magistrates imposed a fine of £3,500, a victim surcharge of £120 and made a costs order of £2,446.69 which sums total £6,066.69 [A10].

33. Subsequently the respondent made an application to the LHA for an HMO licence. The application form is dated 24 November 2015 [R21]. On behalf of the respondent it was submitted that as of that date, namely 24 November 2015, the offence ceased to be committed.

34. In a witness statement made by Mr Kevin Andrew Gray, a principal environmental health officer employed by Barnet LB, he says, in the final paragraph [A127], that the application by the respondent was not made until 3 December 2015.

35. In our judgment an application is made to a court, tribunal or LHA when it is received by the recipient body. Neither party adduced any evidence as to the date on which the LHA received the respondent's application. Doing the best we can with the imperfect materials before us we find that the respondent signed and dated the application on Tuesday 24 November 2015 and it was then sent or delivered to the LHA and was received by the LHA on Thursday 3 December 2015. Thus we find the application was made on 3 December 2015, so that the offence ceased to be committed on 2 December 2015.

36. The subject application to the tribunal was made on 11 April 2016. Thus we find that for the purposes of the rent repayment orders the period over which the offence was being committed was 11 April 2015 to 2 December 2015 inclusive, a period of 236 days ('the relevant period').

37. Over the relevant period the respondent received rent from the four applicants at the rate of £65.62 per day. That totals £15,486.32. In addition, the respondent will have received rental income from the studio flat in the loft. The respondent has not disclosed the amount of that rent. The tenancy agreement for the studio flat is at [A175] and shows that for the period of 12 months commencing 1 August 2015 the rent was £954 per month. That was confirmed by Gray at [A126]. That was not denied by the respondent although his solicitors did say that as the tenant of the studio flat was not making an application for a rent repayment order we should not take it into account. We find that we should because it goes to the profit earned by the landlord from the whole of the property over the relevant period. Drawing on our expertise on rental levels in the private residential sector we infer that such a flat in the subject locality would let at about £900 per month in the period 11 April 2015 to 31 July 2015. On that basis we find that the rental income from the studio flat over the relevant period comes to about £7,202.

    With rounding we find that the total rental income over the relevant period amounts to about £22,690.

38. The respondent has provided a list of expenses said to have been incurred which amount to £54.41 per day. Allowing for a period of 236 days these amount to £12,840.76. The documents provided to support the alleged expenditure were incomplete and not all were helpful or accurate. Further some expenditure, such a carpet cleaning of £54.17 must have been a one-off amount rather than a daily amount of £0.56, and other expenditure, such a 'management fee' which was unsupported is questionable. Thus we must make some adjustments. Again doing the best we can with the imperfect materials provided to us we find that over the subject period the respondent incurred net expenses of £10,000 allowing also for some modest capital appreciation in the value of the property.

39. In these circumstances we find that the respondent achieved a net profit over the relevant period in the order of £12,690.

The amount of the rent repayment orders

40. In or about 2008 the respondent obtained an HMO licence for the subject property. That licence expired in March 2013. In the interim the respondent adapted the property by extending into the roof to create the studio flat. The respondent says that in consequence of those works he thought the property was no longer an HMO, because there were only two floors sharing, and so he did not seek to renew the licence. The applicants disagree with that and say that the respondent did not seek a

new licence because he had not obtained a proper planning permission for the works and that he did not want council officers coming round to inspect the property.

41. The respondent did not adduce any evidence to support his case on this point. He does not say if he sought professional advice on the point and certainly if he did, none was provided to us. Equally the applicants did not provide any evidence to support their view on the respondent's motives for not seeking a new licence.

42. We find that the respondent is a professional landlord. In relation to the subject property he had some knowledge that it was subject to the HMO licensing regime – hence the 2003 licence. In the absence of any supporting evidence we treat his explanation for not seeking a new licence in 2013 with some caution.

43. We note that the magistrates imposed a fine of £3,500 and we infer from that they took the view there was a deal of culpability on the part of the respondent. The fine and costs order in this case was substantially more than those made in the authorities cited above.

44. Drawing the various strands together we find that in the circumstances of this case it is appropriate to start with a figure of 75% of the net profits achieved. That amounts to £9,517. If the whole of the fine plus costs of £6,066 were then deducted that would leave only £3,451. However, if about 75% of the fine plus costs were deducted that would leave about £5,000 which might be applied to rent repayment orders.

45. In the summary of the written submissions on behalf of the respondent it was submitted that we should take into account "the breaches of agreement by the applicants." In fact, in paragraph 33 of the respondent's statement of case the only breach mentioned was the alleged poor conduct of one of the applicants, Ms O'Connor, in frequently delaying in paying her rent thus causing the respondent to have to chase her for the rent. We reject that submission. No evidence was adduced to support it. It was not alleged that there are or were any arrears of rent applicable to the relevant period.

46. We are satisfied that there is no adverse conduct on the part of the applicants (or any of them) that we should properly take into account when considering the amount of the rent repayment orders to make.

47. In the applicants' statement of case they make a number of allegations concerning the manner in which the respondent manages the property. We find that we should not take them into account because they are unrelated to the offence under section 72(1).

48. Other than in connection with the rental income and expenses relating to the subject property over the relevant period, the respondent did not put forward any of his financial circumstances that he wished us to take into account.

49. Although Ms Nee pays a rent quite a bit less than the other applicants we consider that all four applicants should be treated the same. We have therefore divided the sum of £5,000 equally between the four applicants to produce a rent repayment order of £1,250 each.

50. In arriving at this figure we have balanced the rival and conflicting arguments of the parties. We have tried to be fair to and to do justice to both parties. We have taken 75% of the fine plus costs into account because if the whole amount of the fine plus costs were taken into account it would leave too small a balance from which the rent repayment orders might be funded. We took the view that it would be unfair to deprive the applicants of a reasonable rent repayment order simply because of the amount of the fine plus costs which the magistrates saw fit to impose.

John Hewitt
27 July 2016

Housing Act 2004

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) ...
(3) ...
(4) ...
(5) ...
(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.
(7) ...
(8) ...
(9) ...
(10) ...

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) ...
(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).
(3) ...
(4) ...
(5) If–
(a) an application in respect of an HMO is made to the appropriate tribunal by the local housing authority or an occupier of a part of the HMO, and
(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),
the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the [relevant award or awards of universal credit or the] [2] housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the

periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).
(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters–
(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),
(b) that—
(i) one or more relevant awards of universal credit have been paid (to any person); or
(ii) housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO,
during any period during which it appears to the tribunal that such an offence was being committed,
(c) that the requirements of subsection (7) have been complied with in relation to the application.
(6A) ...
(7) ...
(8) If the application is made by an occupier of a part of the HMO, the tribunal must be satisfied as to the following matters–
(a) that the appropriate person has been convicted of an offence under section 72(1) in relation to the HMO, or has been required by a rent repayment order to make a payment in respect of—
(i) one or more relevant awards of universal credit; or
(ii) housing benefit paid in connection with occupation of a part or parts of the HMO;
(b) that the occupier paid, to a person having control of or managing the HMO, periodical payments in respect of occupation of part of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO, and
(c) that the application is made within the period of 12 months beginning with–
(i) the date of the conviction or order, or
(ii) if such a conviction was followed by such an order (or vice versa), the date of the later of them.
(9) ...
(10) In this section–
...
"occupier", in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence or otherwise (and "occupation" has a corresponding meaning);
Payment
...

74 Further provisions about rent repayment orders

(1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).
(2) Where, on an application by the local housing authority, the tribunal is satisfied–
(a) that a person has been convicted of an offence under section 72(1) in relation to the HMO, and
(b) that—
(i) one or more relevant awards of universal credit (as defined in section 73(6A)) were paid (whether or not to the appropriate person), or
(ii) housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO,
during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO in question,
the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority [the amount mentioned in subsection (2A)
This is subject to subsections (3), (4) and (8).
(2A) The amount referred to in subsection (2) is—
(a) an amount equal to—
(i) where one relevant award of universal credit was paid as mentioned in subsection (2)(b)(i), the amount included in the calculation of that award under section 11 of the Welfare Reform Act 2012, calculated in accordance with Schedule 4 to the Universal Credit Regulations 2013 (housing costs element for renters) (S.I. 2013/376) or any corresponding provision replacing that Schedule, or the amount of the award if less; or
(ii) if more than one such award was paid as mentioned in subsection (2)(b)(i), the sum of the amounts included in the calculation of those awards as referred to in sub-paragraph (i), or the sum of the amounts of those awards if less, or

(b) an amount equal to the total amount of housing benefit paid as mentioned in subsection (2)(b)(ii),
(as the case may be).
(3) If the total of the amounts received by the appropriate person in respect of periodical payments payable as mentioned in paragraph (b) of subsection (2) ("the rent total") is less than the [amount mentioned in subsection (2A)], the amount required to be paid by virtue of a rent repayment order made in accordance with that subsection is limited to the rent total.
(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.
(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.
This is subject to subsections (6) to (8).
(6) In such a case the tribunal must, in particular, take into account the following matters–
(a) the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);
(b) the extent to which that total amount–
(i) consisted of, or derived from, payments of relevant awards of universal credit or housing benefit, and
(ii) was actually received by the appropriate person;
(c) whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;
(d) the conduct and financial circumstances of the appropriate person; and
(e) where the application is made by an occupier, the conduct of the occupier.
(7) In subsection (6) "relevant payments" means–
(a) in relation to an application by a local housing authority, payments of relevant awards of universal credit, housing benefit or periodical payments payable by occupiers;
(b) in relation to an application by an occupier, periodical payments payable by the occupier,
(i) where one or more relevant awards of universal credit were payable during the period in question, the amount mentioned in subsection (2A)(a) in respect of the award or awards that related to the occupation of the part of the HMO occupied by him during that period; or
(ii) any amount of housing benefit payable in respect of the occupation of the part of the HMO occupied by him during the period in question.
(8) A rent repayment order may not require the payment of any amount which–
(a) ... or
(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier's application under section 73(5);
and the period to be taken into account under subsection (6)(a) above is restricted accordingly.
(9) ...
(10) ...
(11) ...
(12) ...
(13) ...
(14) Any amount payable to an occupier by virtue of a rent repayment order is recoverable by the occupier as a debt due to him from the appropriate person.
(15) ...
(16) ...

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.