



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

Case Reference : **BIR/00FK/HMK/2019/0020
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Subject Property : **26 Queensway
Derby
DE22 3BE**

Applicants : **(1) Holly Percival
(2) Francesca Turner
(3) Ryan Plant
(4) Zachary Herrod
(5) Andrew Jason Haines
(6) Elliott Andrew Jackson
(7) Molly Burke**

Representative : **Mrs S Percival**

Respondent : **Mrs Annabel Lewis**

Representative : **Mr Daniel Hoare**

Type of Application : **Application under section 41(1) of the
Housing and Planning Act 2016 for
rent repayment orders**

Date of Hearing : **6th August 2019**

Tribunal Members : **Graham Freckelton FRICS (Chairman)
Robert Chumley-Roberts MCIEH, J.P**

DECISION

INTRODUCTION

1. This is a decision on an application for rent repayment orders 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 Applicants are seven former tenants of 26 Queensway Derby, DE22 3BE ('the subject property'). Prior to the hearing the Tribunal was informed that the Applicants Representative would be Mr Elliott Andrew Jackson (one of the Applicants). However, the hearing was attended by Mrs S Percival, the mother of one of the Applicants as Mr Jackson was unable to attend.
7. By the same token the Respondent was represented at the inspection and at the hearing by Mr Daniel Hoare of Jigsaw Property Management Ltd.
8. By applications dated 29th April 2019 and received by the Tribunal on 8th May 2019, all seven of the occupiers referred to above applied for rent repayment orders under section 41 of the 2016 Act. They alleged that the Respondent was controlling or managing the subject 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.
9. Directions were issued on 28th May 2019 following which submissions were made and copied to the other party.

10. It is apparent from the documentation received from the Applicants that the property was occupied by them on an Assured Shorthold Tenancy dated 23rd November 2017 for a term of twelve months from 1st July 2018 at a rental of £3,150.00 per calendar month.
11. The Applications all confirm that the Applicants are requesting rent repayments for the period 1st October 2018 to 30th April 2019 (Seven Months). However, at the hearing it was submitted by the Applicants that the period was actually 1st October 2018 to 30th June 2019 (Nine Months), the later date being then end of the tenancy period and prior to the granting of the HMO Licence. The reason given was that at the time of the application the Applicants were not aware when the licence would be granted. This was accepted by the Tribunal and not disputed by the Respondent.
12. All seven Applications submit the same basic grounds for requesting a rent repayment:
 - a) The property was an unlicensed HMO.
 - b) The property did not comply with fire safety regulations.
 - c) There were safety concerns regarding the staircase banister.
 - d) The boiler was continually faulty.
 - e) The gardens were poorly maintained.
 - f) There was poor communication to allow third parties to enter the house with either no notice or less than 24 hours' notice being given.
 - g) Third parties were allowed to enter the house without the Applicants permission.
13. In the pre-hearing bundle, the Respondent submits that the HMO Licence was granted by Derby City Council on 10th July 2019 and will expire on 9th July 2024, unless previously revoked. A copy of the Licence was copied to the Tribunal and to the Applicants.

THE LAW

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 inspected the subject property on 6th August 2019 in the presence of Mrs Annabel Lewis (the Respondent) and Mr Daniel Hoare (the Respondent’s Representative).

16. The property comprises of a substantial detached house situated off a service road adjacent to a busy roundabout on the Derby ring road close to the University of Derby.
17. The property is built of traditional cavity brick construction surmounted by a pitched tiled roof with areas of flat felt roof to both the front and rear elevations.
18. Briefly the property comprises of an entrance porch leading to the hallway with stairs off to the first floor and store under. There is a cloakroom off the hallway being fitted with a low flush WC and wash hand basin. There is a communal living/dining room and communal kitchen which is fitted with a range of fitted base and wall cupboards incorporating an inset stainless-steel sink unit, double oven, a six-ring gas hob with extractor over and built-in washing machine.
19. On the ground floor there are three en-suite double bedrooms and on the first floor the landing leads to four further en-suite double bedrooms. All the bedrooms to both the ground and first floors include basic furnishings and a central heating radiator. Some windows are PVC double glazed and some timber single glazed.
20. All the shower rooms are fitted to a similar standard having shower cubicles, wash hand basins and low flush WC's. All the shower rooms have fitted extractor fans and radiators. Again, glazing is predominantly sealed unit double glazing although there are some single glazed windows.
21. The central heating is provided by a wall mounted gas fired combination boiler located in an external boiler room. There is a fire alarm system fitted to the property with the control panel being located in the ground floor hallway.
22. The Tribunal found the property to be generally untidy and in need of internal and external redecoration.

THE HEARING

23. Following the inspection, a hearing was held at Derby Justice Centre. The hearing was attended by Mrs S Percival as Representative of the Applicants, Mrs Annabel Lewis (the Respondent) and Mr Daniel Hoare (the Respondent's Representative).
24. At the commencement of the hearing the parties confirmed to the Tribunal that all the tenants were paying the same rent of £450.00 per calendar month towards the overall monthly rent of £3150.00.
25. It was accepted by the Respondent that the Respondent had accepted rent from the Applicants for a period when the property was an unlicensed HMO.
26. The Respondent submitted that the rules for HMO licensing had changed on 1st October 2018. It was further submitted that the Respondent had purchased the property in 2013/2014 jointly with her husband. At that time, they understood it was not required to be licensed, but later when the licensing regime changed and the property needed a licence, her husband, who was dealing with the licence application had had a heart attack. The Respondent had been in email correspondence with the Licensing Officer of Derby City Council as she owned a further property on Otter Street, Derby which was also an HMO and where the licence needed to be renewed. The Respondent had mistakenly assumed that her discussions with the Licensing Officer in respect

of the property in Otter Street also included the subject property and that Derby City Council therefore understood that there would be a delay in submitting the applications for the HMO licences.

27. Unfortunately, the licence application for the subject property was not completed due to the Respondent's husband's illness. At the same time the Respondent was experiencing difficulties with her managing agents and it was only after the present managing agents took over that the formal application was submitted to Derby City Council.
28. The Respondent submitted that she was a responsible landlord and that the failure to obtain a licence was not intentional but due to a combination of factors and misunderstanding on her part.
29. The Applicant submitted that the Respondent was an established residential landlord who was well aware of the requirements in respect of HMO licensing. This was evidenced by the Respondent's ownership of another HMO property in Otter Street, Derby as well as ownership of other properties on Queensway, Derby, North Parade, Derby and Greenway, Derby which were not HMOs.
30. The Applicant further submitted that despite the Respondent's assertion that the property was in good condition works had been required prior to the granting of the licence. The Respondent confirmed that the works were generally of a minor property management nature with the only major work being the under boarding of the staircase.
31. The Respondent confirmed that she incurred regular monthly expenses in respect of the property briefly detailed as follows:
 - a) Gas and electric charges £345.00.
 - b) Water and sewerage charges £40.00.
 - c) Internet provision £40.00.
 - d) Mortgage costs £1254.00.
 - e) Boiler service agreement £14.70.
 - f) Management fees amounting to 7.5% plus VAT on the rents collected.
 - g) Fire alarm service £1156.00 for three properties for a period of six months.

DETERMINATION OF THE TRIBUNAL

32. 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 she 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 Applicants were entitled to apply to the Tribunal for rent repayment orders.
 - (iii) Whether the Tribunal should exercise its discretion to make rent repayment orders.
 - (iv) Determination of the amounts of any orders.

Offence under section 72(1) of the 2004 Act

33. In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord of the subject property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 72(1) of the 2004 Act. At the hearing she readily accepted that she had committed the offence.
- (i) Throughout the period from 1st October 2018 to 30th June 2019 the subject property was a house in multiple occupation subject to mandatory licensing.
 - (ii) The subject property was not licensed.
 - (iii) The Respondent was the person having control and/or managing the subject property.

Entitlement of the Applicants to apply for rent repayment orders

34. The Tribunal determined that the Applicants were 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 (29th April 2019).

Discretion to make rent repayment orders

35. 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.

Amounts of Rent Repayment Orders

36. 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 Applicants' claims satisfy that condition.

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. All the Applicants claim rent repayment of £4,050.00 being 9 months' rent paid.

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.

37. 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.

38. 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 Rent Repayment Order (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 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.

39. Distilling the substance of those observations and applying them to the facts of the present case, the Tribunal determines that various deductions should be made from the maximum amounts set out in paragraph 31.

40. The rent paid by the Applicants included gas and electricity charges, water and sewerage charges, boiler service agreement, internet charges and the fire alarm service/maintenance agreement. The Tribunal finds that the benefit of those items accrued to the tenants (and not to the Respondent) and that the costs should not be included in the rent repayment orders. The Tribunal determines that, since there were seven tenants occupying the subject property during the relevant period, a deduction of one seventh of the costs should be applied to each of the seven Applicants.

41. On the same principle, as applied by the Upper Tribunal in *Fallon v Wilson* [2014] UKUT 0300 (LC), the Tribunal determines that there should be further deductions to reflect part of other outgoings paid by the Respondent out of the gross rents received from the Applicants. Specifically, the Tribunal determines that mortgage interest payments of approximately £1254.00 per month should be taken into account together with a further sum of £283.50 per month in respect of management fees and VAT. This is calculated at £3150.00 x 7.5% = £236.25 + VAT at 20% (£47.25) = £283.50.
42. With regard to the fire alarm service maintenance agreement the Tribunal determined that the sum of £64.22 per month was the appropriate cost for the property. This was calculated as follows: -
- Total cost £,1156.00 for three properties for six months.
- Total cost for each property £385.33.
- Total cost per month £64.22.
43. The quantification of the deductions referred to in paragraphs 39, 40, 41 and 42 is set out in the table below –

Expenditure	Cost to Respondent per month
Gas and electricity	£345.00
Water and sewerage	£40.00
Internet	£40.00
Boiler Service	£14.70
Fire Alarm	£64.22
Mortgage payments	£1254.00
Management fees	£283.50
Total	£2041.42

44. In accordance with section 44(4)(a) of the 2016 Act, the Tribunal considered the conduct of the landlord and tenant. The Tribunal finds that there is no evidence of conduct on either side which would affect its decision. Although the Tribunal notes that the Respondent is a professional landlord it finds that she did not deliberately flout the requirement to obtain a HMO licence for the subject property and endeavoured to obtain a licence, although not as quickly as she might. There were however extenuating circumstances which the Tribunal is prepared to accept.
45. Therefore, the Tribunal is satisfied that there is nothing in the conduct of the parties to justify any adjustment to the amount of the rent repayment orders.
46. In accordance with section 44(4)(b) of the 2016 Act, the Tribunal considered the financial circumstances of the landlord. Mrs Lewis did not provide details of her income and expenditure but the Tribunal was informed that she owns five residential letting properties (including 26 Queensway) and is employed as an Auctioneer. The Tribunal therefore

determined not to make any further allowance to reflect financial circumstances.

47. The Tribunal therefore determines that the appropriate amount of the rent repayment order would be the gross rent paid of £3150.00 less £2041.42 per month.

48. The quantification of the rent repayment orders is therefore: -

Gross Rent:	£3,150.00 per calendar month
Less Deductions:	<u>£2,041.42 per calendar month</u>
Total	£1,108.58 per calendar month

49. With regard to the length of time the Tribunal can consider making the Rent Repayment Order this commences on 1st October 2018 (the date mandatory licensing became due) and expires on 29th April 2019 (being the date the application was made to the Tribunal (S41(2)(b) of the Act)). This is six months and 29 days. The Tribunal therefore rejects the Applicant's submission that the order should be made for a period of nine months expiring on the date the tenancy terminated.

50. The monthly amount is detailed above in paragraph 48. The daily rate is calculated as follows:

Annual repayment amount (£1,108.58 x 12) £13,302.96.
 $£13,302.96 \div 365 = £36.45$ per day x 29 days (1st – 29th April) = £1,057.05.

51. The Tribunal therefore confirms the total amount of the Rent Repayment Order as follows:

£1,108.58 per month for six months	£6,651.48
Rate for 29 days	<u>£1,057.05</u>
Total	£7,708.53

52. The Tribunal therefore confirms the total amount of the Rent Repayment Order of £7,708.53.

53. The Tribunal therefore determines that the Rent Repayment due to each of the Applicants is the sum of £1,101.22 (£7,708.53 ÷ 7). Payment should be made in full within 28 days of the date of this decision.

APPEAL

54. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date specified below stating the grounds on which that party intends to rely in the appeal.

Date: 15th August 2019

Graham Freckelton FRICS
Chairman
First-tier Tribunal (Property Chamber)