



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

Case Reference : **MAN/00CG/HMF/2019/0061**

Property : **14 Bower Road, Sheffield S10 1ER**

Applicant : **Ms Amy Walsh**

Respondent : **Eaglebrooke Properties Ltd**

Type of Application : **Housing and Planning Act 2016 - Section 41(1)**

Tribunal Members : **Mr S Moorhouse LLB
Mr IR Harris BSc FRICS**

Date of Decision : **23 January 2020**

Date of Determination : **4 February 2020**

DECISION

DECISION

The tribunal makes a rent repayment order in the sum of £2361.60, to be paid by the Respondent to the Applicant within 28 days of the date of this decision.

REASONS

The Application

1. The Applicant applied to the tribunal for a rent repayment order pursuant to section 41(1) of the Housing and Planning Act 2016 ('the 2016 Act') on 20 August 2019 ('the Application'). Directions were issued on 13 November 2019 pursuant to which the Applicant and the Respondent each made a written submission to the tribunal. The tribunal considered it appropriate to determine the Application on the papers without the need for an inspection, neither party having requested a hearing. At the same time the tribunal considered and determined an equivalent application submitted by another tenant at the Property, Ms Elizabeth Matthews, under reference MAN/ooCG/HMF/2019/0098. The decision in Ms Matthews' case is issued as a separate document.

Applicant's Submission

2. The basis for the Application was that the Applicant had rented accommodation at the Property from 7 July 2018 to 30 June 2019, and that the Property had been unlicensed. An assured shorthold tenancy agreement had been entered into on 12 January 2018 between the Respondent as landlord, and the Applicant and four others as tenants, at a rent of £84.00 per person per week. The letting had been managed by BPS Estates.
3. In a short statement to the tribunal the Applicant explained that she and the other tenants had contacted the council with regard to an unresolved rat infestation and received a visit from the local housing authority. At the visit the tenants had been informed that the property was required to be licensed as a house in multiple occupation and no licensing application had been received.
4. In her Application the Applicant sought full repayment of the rent paid to the Respondent for the entire duration of the tenancy, calculated by the Applicant to be £4,291.20 per tenant. The Applicant's submission included evidence that her rent had been paid in the form of copy receipts from BPS Estates.

Respondent's Submission

5. The Respondent's submission appeared to the tribunal to relate to both the Applicant's case and Ms Matthews': it referred to the Applicant applying for a rent repayment order, gave the reference for Ms Matthews' case and included proposals relating to all five tenants. Given that the facts were the same in both cases (the Applicant's and Ms Matthews') the tribunal accepted the written submission as a response in relation to both.

6. The overall duration of the tenancy and the rent payable under the tenancy were not in issue. The Respondent submitted that the Property was not required to be licensed until a change in the law redefining HMO's came into effect on 1 October 2018. The Respondent confirmed that the Property was not licensed for the period from 1 October 2018 until a licence was applied for on 4 April 2019 (immediately upon becoming aware of the change in legislation), with the licence being finalised on 4 June 2019. It was also submitted that the inspection by the local housing authority identified only a small amount of additional work required as part of the approval process, that this did not compromise the residence in the Property of the tenants and that the work was completed as soon as possible.
7. The Respondent supplied evidence, in the form of correspondence and formal notices, that in relation to its failure to obtain a licence the local housing authority had imposed a financial penalty of £1500 (on the company) as an alternative action to prosecution.
8. The evidence showed that the authority had been satisfied that an offence had been committed under Section 72 of the Housing Act 2004 and that the Respondent company were the persons having control of the Property. The authority had identified that the Respondent was registered at Companies House as a business dealing with lettings and operating own or leased real estate. The authority had stated that the level of the financial penalty had been intended to reflect the seriousness of the offence, to ensure that there was no economic consequence of failing to license the Property and to deter the Respondent and other landlords from committing similar offences in the future.
9. The Respondent submitted that the delay in obtaining a licence had not been willful or deliberate, but a consequence of being unaware of the changes in licensing requirements. As there had been a full management agreement with BPS Estates the Respondent had relied on its agent to update it on new requirements - the lapse was being addressed and management had been changed. The Respondent stated that it had also taken additional measures to ensure it was kept up to date on changes to regulation through membership with the RLA.
10. In relation to the pest problem the Respondent submitted that there had never been an issue previously. Whilst the agents had advised that the Property was not being maintained in good condition by the tenants (and this would not have helped the problem), the Respondent had been keen to remedy the problem as soon as possible - the agent had been authorised to do whatever was required as quickly as possible. A note from a contractor dated December 2019 indicating that the Property had been left in an unlivable condition by the previous tenants was included with the Respondent's submission.
11. The Respondent's submission included prints of emails related to the tidiness and cleanliness of the Property and the infestation issue. The Respondent also included a statement from its agent of income and expenditure for the period 14 September 2018 to 30 June 2019.
12. The Respondent accepted there had been a delay in obtaining the licence and proposed repaying all of the tenants for the entire unlicensed period from the regulation change on 1 October 2018. This was calculated as a repayment of £2940 per tenant.

13. The Respondent stated that it was hoped this proposal showed its desire to conclude the situation in good faith and its awareness of its responsibilities. The Respondent further indicated a hope that if its proposal was agreeable the matter could be resolved without going to determination.

The Law

14. The change in the law referred to by the Respondent came into effect on 1 October 2018 and is set out in the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. The new definition removed a requirement that the HMO (or part) comprises three storeys or more, retained the requirement that the HMO is occupied by 5 or more persons living in 2 or more single households, and introduced various other tests.
15. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.
16. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount to be repaid - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.
17. The Upper Tribunal decisions in *Parker v Waller and others* [2012] UKUT 301 (LC) and *Fallon v Wilson and others* [2014] UKUT 300 (LC) relate to the amount of a rent repayment order under the Housing Act 2004 ('the 2004 Act'). In the 2004 Act, section 74(4) provides that (where there has been no conviction) the tribunal shall order such amount as is reasonable in the circumstances. Whilst section 44 in the 2016 Act does not use the word 'reasonable', given the similarities between section 44 and the other provisions of section 74 of the 2004 Act it is reasonable to conclude that the principle of 'reasonable amount' applies to section 44 and that these Upper Tribunal decisions remain relevant.
18. In the *Parker* case the lower tribunal had ordered 100% rent repayment. The President stated that the critical issue was what criteria should govern the meaning of 'such amount as the tribunal considers reasonable in the circumstances' as used in section 74(5) of the 2004 Act. That depended on its purpose, and for that the President turned to Hansard, discovering three purposes: (1) to provide for further penalty additional to any fine, (2) to help discourage illegal letting; and (3) to resolve problems that would arise from a tenant withholding rent. He then decided that:
 - any fine imposed is a relevant factor
 - there is no presumption or starting point of 100% refund
 - the tribunal should consider the length of time an offence was being committed
 - the benefit obtained by the tenant of having the accommodation is not a material consideration
 - payments in respect of utilities should normally be excluded
 - the culpability of the landlord is relevant - a professional landlord is expected to know better.

19. In *Parker* the President awarded 75% of the landlord's profit less his fine.
20. In the *Fallon* case Judge Cousins referred to *Parker* and confirmed there was no presumption that the repayment should be of the full amount received by the landlord unless there are good reasons why it should be. The tribunal should take an overall view of the circumstances in determining what amount would be reasonable. He went on to confirm that sums paid out by the landlord on utilities and the like and the amount of any fine should be taken into account, as should the profit level.

Findings and determination

21. The amount sought by the Applicant by way of rent repayment differs from the amount proposed to be repaid by the Respondent. It was the Respondent's hope that the matter could be resolved without a tribunal determination. However there is no evidence before the tribunal that agreement has been reached or that the Applicant wishes to withdraw the Application. In these circumstances the tribunal considers it appropriate to determine the Application. In doing so the tribunal applies the legislation summarised above and takes into account each of the considerations identified in the *Parker* and *Fallon* cases set out above.
22. The correspondence and formal notices included within the Respondent's written submission showed that the local housing authority took the view that the Property came within the definition of an HMO with effect from 1 October 2018, but had not fallen within the previous HMO definition. This was accepted by the Respondent, and in the absence of any evidence to the contrary was accepted by the tribunal.
23. The tribunal finds that the requirements of section 41(1) of the Act have been met and that the Applicant was entitled therefore to make the Application. In this respect it is not disputed by the Respondent that it has committed the offence of being in control or management of an unlicensed HMO contrary to section 72(1) of the 2004 Act (item 5 within the table at section 40(3) of the 2016 Act).
24. The tribunal finds that the requirements of section 41(2) of the 2016 Act are met: It is common ground that the Applicant was a tenant of the Property during the entire period in which the Property was required to be licensed and was not so licensed. The offence was committed in the period of 12 months ending with the date of the Application, namely 20 August 2019. The Applicant therefore had the right to apply to the tribunal.
25. The tribunal finds also that the requirements of section 43(1) are met (having found that the offence of being in control or management of an unlicensed HMO has been committed). The tribunal may therefore make a rent repayment order.
26. The amount of any repayment is to be determined by the tribunal pursuant to section 44. Provisions within section 46 of the 2016 Act requiring a maximum repayment in the event that the tribunal makes an order do not apply in the present case because the offence is not one of those specified at section 46(3)(a).
27. Section 44(2) of the 2016 Act prescribes that (for the type of offence in the present case) any repayment 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. With the benefit of the parties' submissions and the copy tenancy agreement supplied, the

tribunal determined this period to be 1 October 2018 to 3 June 2019 (inclusive). The tribunal accepted the Applicant's evidence that the rent due from her under the tenancy agreement had been paid.

28. The particular considerations at section 44(4) of the 2016 Act relate to conduct of both parties, landlord's financial circumstances and any conviction(s) to which that Chapter of the 2016 Act applies.
29. The correspondence and formal notices submitted by the Respondent evidence there being no prosecution or resulting conviction for failure to obtain a licence for the Property when required to do so. The local housing authority considered the circumstances to be such that a modest financial penalty sufficed. There is no evidence of a conviction for any other matter listed in the table at section 40(3) to the 2016 Act.
30. Turning to 'financial circumstances', there is little evidence before the tribunal on this subject. The local housing authority were satisfied that the Respondent had sufficient financial resources to pay the financial penalty and the Respondent's own submission included a proposal to make rent repayments to all 5 tenants. The particulars within the managing agent's statement of income and expenditure supplied by the Respondent are limited but a net property income is shown. There is also evidence of the Property having been left in poor condition by the tenants, suggesting that further expenditure concerning the tenancy may be required. The tribunal considered there to be no reason to believe that the Respondent would be unable to make any repayment of rent ordered by the tribunal.
31. In relation to conduct of the Respondent, the tribunal accepted the Respondent's contention that the failure to apply for a licence at the appropriate time was through lack of awareness, and not willful non-compliance. It was accepted by the tribunal that the Respondent had immediately sought a licence upon becoming aware of the requirement, thus minimising the period in which the offence was committed. It was also accepted by the tribunal that steps had been taken to reduce the risk of a similar issue arising in future, through changes to management arrangements and joining a professional body. On the issue of the Applicant's conduct, whilst there was some evidence to suggest that the tenants collectively had not left the Property in good order, there was no specific evidence of misconduct on the part of the Applicant.
32. Overall the tribunal considered that it was appropriate to make a rent repayment order in favour of the Applicant. In terms of the amount, there were some mitigating factors in the Respondent's favour. As per the *Parker* and *Fallon* cases it would be inappropriate to make a presumption or take a 'starting point' of 100% repayment for the period in which the offence was committed. The tribunal considered that in the present case the mitigating factors identified suggested that any repayment should indeed be less than 100%.
33. The tribunal also considered the Respondent to be a professional landlord, (notwithstanding the appointment by the Respondent of a managing agent). Applying the principles in the *Parker* case this would limit any reduction the tribunal might otherwise be minded to allow. Taking into account all of the circumstances the tribunal considered that its deduction should be limited to 20%, determining that 80% of the Applicant's rent should be repaid to her in relation to the period during which the offence was committed.

34. The rent repayment is calculated therefore based on an 80% repayment of rent at £84 per week, for the period 1 October 2018 to 3 June 2019 (inclusive).
35. The tribunal accordingly makes a rent repayment order in the sum of £2361.60, to be paid by the Respondent to the Applicant within 28 days of the date of this decision.

S Moorhouse

Tribunal Judge

Schedule

Housing and Planning Act 2016

Section 40

(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).....

(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 Housing Act 2004 “control or management of unlicensed HMO”

Section 72(1) provides: (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.

Section 41

(1) A tenant.....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.

Section 43

(1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

Section 44

(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.

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay 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.