



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

Case Reference : **LON/00AK/HMK/2019/0063**

Property : **107 Cranborne Crescent, Potters Bar, Hertfordshire EN6 3AE**

Applicant : **Miss Raya Nenova**

Representative : **In person**

Respondent : **Mrs Virginia Kent**

Representative : **Mr Kahloon of Counsel**

Type of Application : **Application for a rent repayment order by the tenant**
Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016

Tribunal Members : **Judge N Hawkes**
Mr H Geddes

Date and venue of hearing : **3 February 2020 at 10 Alfred Place, London WC1E 7LR**

Date of Decision : **4 February 2020**

DECISION

Decision of the Tribunal

The Tribunal makes a rent repayment order in favour of the Applicant in the sum of £219.35, representing two thirds of the rent net of the landlord's expenses.

The application

1. By an application dated 31 July 2019, the Applicant tenant (Miss Nenova) applied for a rent repayment order against the Respondent landlord (Mrs Kent).
2. On 12 September 2019, the Tribunal issued Directions leading up to a final hearing which took place on 3 February 2020.
3. The Applicant attended the hearing in person accompanied by Mr Nenova, her father. The Respondent attended the hearing in person and was represented by Mr Kahloon of Counsel. Both the Applicant and the Respondent gave oral evidence.
4. The Tribunal adopted a flexible approach to its procedure, allowing Mr Nenova to assist the Applicant by asking questions of the Respondent and by addressing the Tribunal.
5. The Tribunal also adjourned for twenty minutes immediately before the Applicant cross-examined the Respondent in order to give the Applicant additional time in which to formulate her questions and extended the lunch adjournment in order to give the parties further time in which to prepare their closing submissions.

The Tribunal's determinations

6. Section 40 of the Housing and Planning Act 2016 ("the 2016 Act") provides that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent which has been paid by a tenant.
7. Statutory guidance for local housing authorities concerning rent repayment orders under the 2016 Act was published on 6 April 2017 ("the Statutory Guidance"). The Tribunal has had regard to the Statutory Guidance in determining this application.
8. Section 41 of the 2016 Act provides:

(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.”

9. Section 43 of the 2016 Act provides:

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.

10. The relevant offences are set out at section 40 of the 2016 Act. They include the offence under section 72(1) of the Housing Act 2004 (“the 2004 Act”) of the control or management of an unlicensed house in multiple occupation (“HMO”) and the offence of harassment under the Protection from Eviction Act 1977.
11. It is not in dispute that the Respondent was the Applicant’s landlord at 107 Cranborne Crescent, Potters Bar, Hertfordshire EN6 3AE (“the property”) and that the Applicant was a tenant of the property for a period of ten months from 1 October 2018 until 31 July 2019 (“the relevant period”) during which the property required an HMO licence but was unlicensed.
12. In respect of an offence under section 72(1) of the 2004 Act, the amount of any rent repayment order (“RRO”) must relate to rent paid by the tenant in respect of a period, not exceeding of 12 months, during which the offence was being committed (see section 44(2) of the 2016 Act).
13. By section 44(3) of the 2016 Act, the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid to any person in respect of rent under the tenancy during that period. Applying the case law set out below, the net benefit received by the landlord from the letting is a material consideration.

Whether the Tribunal is satisfied beyond reasonable doubt that the Respondent has committed a relevant offence?

14. The Respondent gave evidence that she was unwell during the relevant period, with bowel and heart problems, and that her illness was significant. At paragraph 13 of her witness statement, the Respondent stated that her husband helped her to manage the property due to her illness. The Respondent gave evidence that she had invasive surgery in June 2018, in June 2019 and in January 2020. The Respondent stated that her husband was only able to work part-time during this period due to the need to look after her.
15. The Respondent did not rely upon any medical report but her oral evidence that was admitted to hospital in June 2019 (within the relevant period) is supported by documentary evidence from the Luton and Dunstable University Hospital.
16. Section 72(5) of the 2004 Act provides that it is a defence to the offence of controlling or managing an unlicensed HMO that a person has a “reasonable excuse” for doing so. Mr Kahloon submitted that Mrs Kent’s illness amounts to a “reasonable excuse” within the meaning of section 72(5) or, alternatively, that her illness should be taken into account in determining the amount of any RRO.
17. The Respondent stated in oral evidence that, during the relevant period, she had been capable of applying for an HMO but that she was unaware of the licencing requirement. It is common ground that ignorance of the licensing requirement is not a defence.
18. The Respondent stated that her functioning was affected by her condition and her drug regime. However, a letter written by the Respondent (with the help of her husband) to the Applicant’s father towards the end of the relevant period demonstrates a significant level of clarity and efficacy.
19. Further, no medical report is relied upon in support of the “reasonable excuse” defence and the Tribunal was not referred to any witness evidence from Mr Kent, who the Applicant appointed to manage the property whilst she was unwell, to the effect that he was unable to apply for a licence on the Appellant’s behalf. The Tribunal is not satisfied on the evidence that the “reasonable excuse” defence has been made out.
20. In all the circumstances, the Tribunal is satisfied beyond reasonable doubt that the Appellant committed an offence under subsection 71(1) of the 2004 Act during the relevant period.
21. The Applicant also contended that the Respondent had unlawfully harassed her by repeatedly demanding Council Tax payments.

22. Clause 4.1.4 of the Applicant's tenancy agreement provides that the tenant agrees to: "Pay the Council Tax ... in respect of the Property for the Term of this agreement, unless the tenancy is lawfully terminated."
23. The Respondent now accepts that she is responsible for the payment of Council Tax because the property is an HMO but, at the material time, she thought that the Applicant was responsible for the payment of Council Tax by reason of clause 4.1.4 of the tenancy agreement. The Respondent accepts that she demanded payment from the Applicant.
24. The communications demanding payment were a strongly worded statement of the Respondent's then belief concerning the payability of the Council Tax bill. However, the Tribunal is not satisfied on the evidence that any of the Respondent's communications were abusive, threatening or otherwise sufficient to amount to the criminal offence of harassment.
25. The burden of proving a criminal offence (beyond reasonable doubt) is higher than the civil standard of proof and, having carefully considered the communications passing between the parties, the Tribunal is not satisfied that this high threshold has been met in respect of the harassment offence.

Did the offence relate to housing that, at the time of the offence, was let to the tenant?

26. It is not in dispute that the offence relates to housing that, at the time of the offence, was let to the Applicant.

Was an offence committed by the landlord in respect of the period of 12 months ending with the date the application was made? What is the applicable period?

27. The Applicant's application was made in July 2019. Accordingly, the offence was committed by the Respondent within the period of 12 months ending with the date on which the application was made.
28. The applicable period in accordance with section 44(2) of 2016 Act is 1 October 2018 to 31 July 2019. The Tribunal accepts the evidence put forward by the Applicant that she paid rent to the Respondent in the total sum of £3,120 during this period, excluding universal credit.

The exercise of the Tribunal's discretion

29. Subsection 43(1) of the 2016 Act gives the Tribunal a discretion as to whether or not to make a RRO if satisfied, beyond reasonable doubt, that a landlord has committed a relevant offence.

30. In the present case, given the length of time during which the offence was committed, it is appropriate for the Tribunal to exercise its discretion to make an RRO.

The amount of the RRO in the present case

31. The Tribunal notes that the conditions set out in section 46 of the 2016 Act (which provides that, in certain circumstances, the amount of a rent repayment order is to be the maximum that the Tribunal has power to make) are not met.

32. Accordingly, in determining the amount of the rent repayment order in the present case, the Tribunal has had regard to subsection 44(4) of the 2016 Act which provides:

(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.

33. During the course of the hearing, reference was made to two decisions of the Upper Tribunal, namely, *Parker v Waller [2012] UKUT 301 (LC)* and *Fallon v Wilson [2014] UKUT 0300 (LC)*. These decisions concern the amount of a rent repayment order under the provisions of the 2004 Act which apply when a relevant offence started to be committed before 6 April 2017.

34. The Tribunal considers that *Fallon v Wilson* and *Parker v Waller* remain relevant authorities under the 2016 Act and neither party sought to disagree as a matter of legal principle.

35. Accordingly, the Tribunal has proceeded on the basis that (i) there is no presumption that there will be a 100% refund of payments made, (ii) the benefit obtained by the tenant in having had the accommodation is not a material consideration (iii) the Tribunal has a general discretion which must be exercised judicially and (iv) the net benefit received by the landlord from the letting is a material consideration.

36. The Respondent gave evidence, which was not disputed and which the Tribunal accepts, that during the relevant period she made mortgage payments referable to the purchase of the property in the sum of £747.60 per month. The Applicant was one of five tenants and it was

agreed that only a fifth of this sum should be considered referable to the Applicant's tenancy (£1,495.20 in total during the relevant period).

37. The Respondent also gave evidence, which the Tribunal accepts, that she paid a Council tax bill in the sum of £1,295.69 in respect of the property which was solely referable to the Applicant's occupancy because the other four occupants had obtained Council Tax exemptions. Taking these payments into account, the net benefit received by the Respondent from letting the property to the Applicant during the relevant period was just £329.01.

38. In determining the amount of the RRO in this case, the Tribunal has had regard to the oral and written evidence which it has received and to all the circumstances of the case. The Tribunal has, in particular, placed significant weight upon:

(i) The length of time during which the offence was committed.

(ii) The unchallenged evidence of the Applicant that her deposit was not held in a rent deposit scheme.

(iii) Evidence given by the Applicant which was not disputed by the Respondent that the Respondent failed to comply with various HMO requirements, for example, relating to door locks and emergency lighting. The Respondent was unaware of these requirements until she made an HMO licence application in September 2019.

(iv) Whilst the Respondent gave evidence that she had complied with fire safety requirements when she first let the property, it appeared from her evidence that she did not take steps to ensure that these remained in place. The Tribunal accepts the Applicant's evidence that, throughout her tenancy, either there was no fire blanket in the kitchen or the location of the fire blanket was insufficiently clear for the Applicant to be aware of it. The Tribunal accepts the Applicant's evidence that there were other tenancy management issues, in particular delays on the part of Mr Kent in responding to communications from the Applicant.

(v) It is not in dispute that the Respondent is not a professional landlord. She only has one buy-to-let property which she purchased in 2009 for her daughter to occupy whilst at university.

- (vi) It is not in dispute that the Respondent has no criminal convictions.
- (vii) The Tribunal was referred to gas safety certificates including in respect of dates falling within the relevant period.
- (viii) The Tribunal accepts that the Respondent's illness made it more difficult than would ordinarily be the case for the Respondent and her husband to manage the property and considers that this is a significant mitigating factor.
- (ix) The Tribunal accepts the Respondent's evidence that she and her husband put any profit they made from letting the property to their five tenants during the relevant period towards their day to day living expenses because the Respondent was unable to work and her husband was only working part time.
- (x) The Applicant accepted that she was late in making seven of her rent payments.
- (xi) The Tribunal accepts the Applicant's evidence that a dog which was being kept at the property without the Respondent's consent in breach of the terms of the tenancy did not belong to the Applicant.

39. In all the circumstances, the Tribunal determines that it is appropriate to make a rent repayment order in favour of the Applicant in the sum of £219.34, representing two thirds of the rent net of the Respondent's expenses.

Name: Judge Hawkes

Date: 4 February 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).