FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AZ/HMK/2019/0067**
Property	**:**	**Flat 4, 43A Deptford Broadway, London, SE8 4PH**
Applicants	**:**	**Jodie Micciche** **Conor O'Rourke** **Andrew Smith**
Representative	**:**	**Andrew Smith and Jodie Micciche**
Respondents	**:**	**Landalls Limited**
Representative	**:**	**Lorraine Power**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Peter Roberts DipArch RIBA**
Date and Venue of Hearing	**:**	**14 February 2020 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**19 February 2020**

DECISION

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Decision of the Tribunal

1. The Tribunal makes a rent repayment order in the sum of £6,350 to be paid by 16 March 2020.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 16 March 2020 in respect of the reimbursement of the tribunal fees paid by the Applicants.

The Application

1. The Tribunal is required to determine an application issued on 28 August 2019 under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment orders ("RRO") in respect of Flat 4, 43a Deptford Broadway, London SE8 4PHX ("the Flat"). On 1 October, the Tribunal gave Directions, pursuant to which both parties have served bundles of documents. The cases have been prepared by both parties with great care.

The Hearing

2. Mr Andrew Smith and Ms Jodie Micciche appeared on behalf of the three applicants. Ms Lorraine Power appeared on behalf of the Respondent. Mr Smith and Ms Power gave evidence. It was apparent that there was an extremely good relationship between the landlord and tenant.

3. The following facts are material:

(i) 43a Deptford Broadway has commercial premises (a barber's shop) on the ground floor and five flats above. These vary in size. The Flat has two bedrooms, a living room, a kitchen and a bathroom.

(ii) The Applicants occupied the flat pursuant to a tenancy agreement for a twelve month period between 15 August 2018 and 14 August 2019. They paid a deposit which was placed in a rent deposit scheme and which was returned at the end of the tenancy.

(iii) The Applicant owns 24 flats, including the five flats at this property. It arranged for CityRez Estate Agent Ltd to advertise the property and grant the tenancy. The Respondent thereafter managed the property.

(iv) The three Applicants are actors and performing musicians. They have administrative jobs to supplement their incomes. They knew each other prior to the grant of the tenancy. Ms Micciche and Andrew Smith are partners and shared one bedroom. Mr O'Rourke occupied the second bedroom.

(v) Ms Power stated that the landlord was not advised by the letting agents that a HMO licence was required. The Respondent was unaware that such a licence was required until the London Borough of Lewisham ("Lewisham") became involved in April 2019. The landlord decided not to apply for a licence, but rather to let the property to a family which would not constitute a House in Multiple Occupation ("HMO"). Prior to the current letting, the property had been let to a single family.

(vi) Ms Power described the Applicants as excellent tenants.

(vii) The Applicants described some modest disrepair. Most of this was remedied. However, the flat entrance door did not close securely. A new sink had been installed before the tenancy was granted. A tap leaked. In March 2019, the rent was reduced by £100 because the oven was broken. The tenants considered this to be appropriate compensation for this disrepair.

(viii) The Applicants have applied for a RRO on the advice of Lewisham. Lewisham has indicated to the Respondent that it was minded to impose a financial penalty. No such penalty has been imposed.

Our Determination

4. The Tribunal is satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the Housing Act 2004 Act ("the 2014 Act"). We are satisfied that:

   (i) On 11 February 2017, Lewisham introduced an additional licencing scheme for HMOs. Under this scheme all HMOs above commercial properties require a licence where the premises consist of two or more non-related households consisting of three or more people sharing facilities such as a bathroom or a kitchen.

   (ii) The flat is an HMO falling within the definition falling within the "standard test" as defined by section 254(ii) of the 2004 Act. In particular:

      (a) it consists of two units of living accommodation not consisting of self-contained flats;

      (b) the living accommodation is occupied by persons who do not form a single household;

      (c) the living accommodation is occupied by the tenants as their only or main residence;

      (d) their occupation of the living accommodation constitutes the only use of that accommodation;

      (e) rents are payable in respect of the living accommodation; and

(f) the households who occupy the living accommodation share the kitchen, a bathroom and a toilet.

(iii) The Respondent failed to licence the HMO as required by section 61(2) of the 2004 Act. This is an offence under section 72(1).

(iv) The offence was committed over the period of 15 August 2018 to 14 August 2019.

(v) The offence was committed in the period of 12 months ending on 28 August 2019, namely the date on which the application was issued.

5. The 2016 Act gives the Tribunal a discretion as to whether to make a RRO, and if so, the amount of the order. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenants during this period, less any award of universal credit paid to any of the tenants. We are satisfied that the Applicants were not in receipt of any state benefits and that they paid the rents from their earnings.

6. The Applicants have applied for a RRO in respect of the rent of £13,100 which they paid between 14 September and 15 July 2019, namely ten payments of £1,200 and one payment of £1,100. They have not applied for a RRO in respect of the first monthly payment of £1,200 which was rolled up with their deposit.

7. Section 44 of the 2016 Act, requires the Tribunal to take the following matters into account:

(i) The conduct of the landlord.

(ii) The conduct of the tenants.

(iii) The financial circumstances of the landlord.

(iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.

8. In determining the amount of any RRO, we have had regard to the guidance given by the George Bartlett QC, the President of the Upper Tribunal ("UT") in *Parker v Waller* [2012] UKUT 301 (LC). This was a decision under the 2004 Act where the wording of section 74(6) is similar, but not identical, to the current provisions. The RRO provisions have a number of objectives: (i) to enable a penalty in the form of a civil sanction

to be imposed in addition to the penalty payable for the criminal offence of operating an unlicensed HMO; (ii) to help prevent a landlord from profiting from renting properties illegally; and (iii) to resolve the problems arising from the withholding of rent by tenants. There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period. The Tribunal should take an overall view of the circumstances in determining what amount would be reasonable. The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not a material consideration. The circumstances in which the offence is committed is always likely to be material. A deliberate flouting of the requirement to register would merit a larger RRO than instances of inadvertence. A landlord who is engaged professionally in letting is likely to be dealt with more harshly than the non-professional landlord.

9. The UT went on to consider the RRO that was appropriate in that case. In considering the profit made by the landlord during the relevant period, the UT considered it appropriate to make deductions for the costs of insurance, gas, electricity, water, council tax and cleaning. No account was taken of the mortgage payments.

10. The only deduction which we are asked to make in this case relates to the cost of insurance. £3,795.29 was paid in respect of two buildings. We compute that 40%, some £1,520 relates to 43A Deptford Broadway. We apportion some 25%, namely £400 to this flat (the flat is larger than the four other flats). Our starting point is therefore £13,100 less £400, namely £12,700.

11. We accept that the landlord would have incurred additional costs in managing the property. These have not been quantified. On the other hand, the tenants are not claiming in respect of the first months' rent which they paid.

12. We have decided to make a RRO at 50% of £12,700, namely £6,350. We have had regard to the matters specified above. We note that the Respondent owns a number of flats. However, it had employed professional lettings agents who had not advised it that a licence was required. The letting agent should have been aware of the licencing requirements. There is no criticism of the conduct of the tenants. The disrepair is not a significant factor. It is of greater relevance that the tenants were given a proper tenancy agreement and that their deposit was protected in a rent deposit scheme. The RRO is therefore assessed at the lower end of the scale.

13. However, landlords must recognise that this legislation has been passed to protect the health and safety of occupants in HMOs and to ensure that any HMO that requires a licence, is so licenced. Ignorance of the law can only provide limited mitigation.

14. The Tribunal furthers order that the Respondent should refund the tribunal fees of £300 paid by the Applicants pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Their application has succeeded.

Judge Robert Latham
19 February 2020

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.

Appendix of Relevant Legislation

Housing Act 2004

56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either -

(a) the area of their district, or

(b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

61 Requirement for HMOs to be licensed

(1) Every HMO to which this Part applies must be licensed under this Part unless–

(a) a temporary exemption notice is in force in relation to it under section 62, or
(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

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.

254 Meaning of "house in multiple occupation"

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if–

(a) it meets the conditions in subsection (2) ("the standard test");

(b) it meets the conditions in subsection (3) ("the self-contained flat test");

(c) it meets the conditions in subsection (4) ("the converted building test");

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if–

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(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 to that landlord.

	Act	*section*	*general description of offence*
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc

	Act	section	general description of offence
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

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.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of a 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 had 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 with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

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 this table.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

(a) the rent 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,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.