FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/21UD/HMG/2019/0004**
Property	**:**	**Flat 5, 35 Warrior Square, St Leonards on Sea, East Sussex TN37 6BG**
Applicant	**:**	**Castiliano Foini**
Representative	**:**	**-**
Respondent	**:**	**Walter Van Dijk**
Representative	**:**	**-**
Type of Application	**:**	**Application for rent repayment order by tenant**
Tribunal Members	**:**	**Judge E Morrison** **Mr R Wilkey FRICS** **Mr P A Gammon MBE BA**
Date and venue of Hearing	**:**	**4 March 2020 at Bexhill Town Hall**
Date of decision	**:**	**6 March 2020**

DECISION

The application

1. By an application made on 5 November 2019 the applicant leasehold tenant applied for a rent repayment order ("RRO") against the respondent landlord, on the grounds that the respondent had committed an offence under section 95 of the Housing Act 2004 while he rented the property.

The law and jurisdiction

2. The relevant parts of section 95 of the Housing Act 2004 read as follows:

> "95 Offences in relation to licensing of housing under this Part
>
> (1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.
>
> …
>
> (3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time –
>
> (a) [a temporary exemption notice served by the local authority is in effect]
>
> (b) an application had been duly made in respect of the house under section 87.
>
> (4) In proceedings against a person for an offence under subsection (1) … it is a defence that that he had a reasonable excuse–
>
> (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
>
> (b) for failing to comply with the condition,
>
> as the case may be…".

3. Pursuant to section 99 of the Housing Act 2004 a "house" means a building or part of a building consisting of one or more dwellings.

4. The relevant provisions relating to rent repayment orders are set out in sections 40 -46 Housing and Planning Act 2016 ("the Act") which are set out in full in the Appendix to this Order.

5. Section 41 permits a tenant to apply to the first-tier tribunal for a RRO against a person who has committed a specified offence, one of which is an offence under section 95 of the Housing Act 2004, if it relates to housing rented by the tenant and the offence was committed within the 12 months ending with the day on which the application is made.

6. Under section 43, the tribunal may only make a RRO if satisfied, beyond reasonable doubt, that the landlord has committed one of the specified offences.

7. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, section 44 relates to the amount of a RRO. Where an offence under section 95 of the Housing Act 2004 has been committed, the amount must relate to a period, not exceeding 12 months, during which the landlord was committing an offence. It must not exceed the amount of rent paid less any universal credit paid in respect of the rent. In determining the amount tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant (b) the financial circumstances of the landlord.

Background

8. Since 1 October 2015 Hastings Borough Council has operated a selective licensing regime for private rented homes under Part 3 of the Housing Act 2004 applicable to certain wards within the Borough. The respondent's property is within one such ward. The respondent accepts that he was required to obtain a selective licence for the period it was rented out and that he did not do so.

9. The applicant occupied the property, a one bedroom furnished flat, from 17 December 2018 to 17 December 2019, at a rent of £700.00 per month. He claims a RRO in respect of the sum of £8400.00, which the respondent accepts was paid in rent over the 12-month period.

10. The written tenancy agreement signed by the applicant and by the letting agents on behalf of the respondent provides at clause 12: "The Landlord is responsible for the payment of all utilities in relation to the Property". The applicant has not paid any utility bills in respect of his occupancy.

The applicant's case

11. At the hearing the applicant confirmed that he sought a RRO for the sum of £8400.00. He said that he had been put to trouble when, shortly after the tenancy started, the respondent had advised the utility companies to take his own name off the bills and told the applicant to put the bills into his own name, contrary to the tenancy agreement. Despite the bills then being put back into the respondent's name, unpaid bill notices were sent to the property while he lived there.

12. He said that if a selective licence had been obtained, the mandatory conditions attached to such a licence under Schedule 4 to the Housing Act 2004 would have required a second smoke alarm and a carbon monoxide alarm, which were not present. Furthermore, under the local authority's own additional requirements, the flat would need to have a valid Energy Performance Certificate. The one he had been given dated from 2008 and expired in November 2018. The Certificate had not been renewed until January 2020. Mr Foini said that by making

the application for a RRO he was simply protecting his right to live in a property controlled by the licensing regime. He referred to the fact that he was the second tenant to whom the respondent had let the flat without having a licence.

The respondent's case

13. Mr Van Dijk provided a detailed witness statement. He had purchased the property in 2004 but had not lived there, aside from occasional use, since 2005. It had been let out on short term holiday lets, and occasional short term assured shorthold tenancies. From 2012 he had let it out through Airbnb, apart from two assured shorthold tenancies, one for 6 months from October 2017, and the second being the tenancy granted to the applicant.

14. He said that he did not realise that he needed a selective licence before renting out the property. He had been aware that in 2013 the freeholder of 35 Warrior Square, which comprises 10 flats, had obtained a HMO licence for the building, and he thought this was all that was needed. The letting agents who arranged the tenancy with the applicant had not advised him of the need to obtain a selective licence.

15. When the applicant did not move out at the expiration of the contractual six-month term, the respondent prepared and served a notice under section 21 of the Housing Act 1988. Mr Poini told him this was invalid but did not say why. In August the respondent instructed a "professional tenant eviction company" to serve another section 21 notice. It was only on expiration of this notice at the end of October 2019, and when possession proceedings were being contemplated, that this company advised the respondent that he needed to have obtained a licence. The applicant immediately contacted Hastings Borough Council. On the Council being satisfied that the applicant would be moving out shortly, and the flat would then be marketed for sale, the Council did not require the respondent to obtain a licence, or a temporary exemption notice, and took no further action. This was confirmed in emails from the Council to the respondent.

16. Accordingly, the respondent's case was that he had been let down by his agents, that he had made an honest mistake about the effect of the HMO licence, and that he had acted immediately to try to rectify matters once he was aware of the true position.

17. With respect to his financial position, the respondent's evidence was that he had paid a total sum of £1892.33 in utilities (internet, TV licence, water and electricity) attributable to the applicant's occupation. The utilities were in fact more than this, but the letting agents had agreed to pay some of the bills because it was their mistake that the tenancy agreement had stated these were the landlord's responsibility. Mr Van Dijk had only discovered this mistake after the tenancy had started. He also paid £50 p.a. ground rent, service charges of not less than £500.00 p.a, and

insurance of £21.24 pm. These expenses reduced the profit element of the rent.

18. Although little supporting documentary evidence was produced, the tribunal was told that the respondent had a bank overdraft and credit card debts totalling about £16,000.00 which he could not pay, and a low income as a freelance actor. He thought his gross income including rent for the last tax year was around £23,000.00. He was now being forced to sell the property, which is unmortgaged, to pay his debts. He lives in his partner's house and has no financial dependants.

19. Mr Van Dijk said that the property was an elegant flat, furnished to a high standard, and photographs were provided. There were not two storeys (thereby requiring two smoke alarms), just a mezzanine. There was a carbon monoxide alarm on top of a wardrobe.

20. The respondent felt he was being penalised for an honest mistake. He understood the purpose of selective licensing but he was not a rogue landlord and the flat was not in disrepair. It was unfair that the applicant should be able to live in the property effectively free of charge for a year.

21. He asked the tribunal to make a costs order against the applicant on the ground of making an unreasonable claim.

Discussion and determination

22. The tribunal is satisfied beyond reasonable doubt that the respondent has committed an offence under section 95 of the Housing Act 2004. Mr Van Dijk accepts that a selective licence was required. Ignorance of this requirement, however bona fide, does not give rise to a defence of reasonable excuse under section 95(4). Therefore, the tribunal has the power to make a RRO.

23. Section 44 of the Act requires us to take particular account of the conduct of the parties, and the landlord's financial circumstances.

24. Dealing first with conduct, there is no relevant conduct on Mr Foini's behalf that affects the position. As regards Mr Van Dijk, we take into account that he did not intentionally break the law. We accept his evidence that he did not realise that a selective licence was needed until October 2019, and he then sought immediately to rectify matters.

25. With respect to financial circumstances, even if we accept all that the respondent has told us, the fact remains that the property is being sold, and that the respondent will then have a very considerable sum of money available to him. He does not require this money to re-house himself. We also note that he has saved himself the cost of the licence fee. Accordingly we do not find that his financial circumstances are a reason to reduce the amount of a RRO.

26. There are however additional factors which in our view should be taken into account, and which justify ordering repayment of less than the full amount of rent paid by the applicant:

- The respondent has only one property and is not a professional landlord
- He was not renting out the property in circumstances requiring a selective licence at the time the licensing regime was introduced, with attendant publicity, in 2015
- Since licensing was introduced in October 2015, the property has been let out for a total of 18 months
- For at least 12 of those 18 months only one person was in occupation
- He has been let down by the letting agents, whom he could reasonably have expected to advise him of the need for a licence
- The property is in a good state of repair and the applicant has not suffered in any practical way from the lack of a licence
- He has paid utilities totalling £1892.33 from the rent received, and paid other outgoings associated with the property of at least £600.00, reducing the profit element of the rent received
- He acted immediately once he became aware of the need for a licence
- The local authority elected not to take any enforcement action.

27. Starting with the total of £8400.00 paid by the applicant, we find that £2500.00 should be deducted for utilities and other expenses, leaving a net rent of £5900.00. We then make a 25% deduction for the fact that the respondent is not a professional landlord, and a further reduction of £1425.00 to reflect the other mitigating factors mentioned above. In our view this approach strikes the appropriate balance between the punitive and deterrent aspects of an RRO, and the need to take account of the degree of culpability and harm.

28. **Accordingly, we make a rent repayment order in the sum of £3000.00**.

29. The respondent's request for a costs order against the applicant is refused. The applicant was fully entitled to make the application, and has not acted unreasonably in pursuing it

Dated: 6 March 2020

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Sections 40 – 46 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 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) 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 by 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
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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—
(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,
(b) state the amount that the authority seeks to recover, and
(c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

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);

(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 the 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 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.

45 Amount of order: local housing authorities

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a local housing authority, the amount is to be determined in accordance with this section.

(2) The amount must relate to universal credit paid during the period mentioned in the table.

In the order is made on the ground that the landlord has committed	***the amount must relate to universal credit paid 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 the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period.

(4) In determining the amount the tribunal must, in particular, take into account—
(a) the conduct of the landlord,
(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.

46 Amount of order following conviction

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order—
(a) is made against a landlord who has been convicted of the offence, or
(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made—
(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
(b) in favour of a local housing authority.

(4) For the purposes of subsection (2)(b) there is *"no prospect of appeal"* , in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.