



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

Case Reference : **MAN/00BR/HMF/2022/0024**

Property : **11 Adelphi Street, Adelphi Wharf 1 Block C
Townhouse 05, Salford M3 6DZ**

Applicant : **Christopher Lyle Horner**

Respondent : **Anthony Waugh**

Type of Application : **Application for Rent Repayment Order by tenant
Section 41 (1) Housing and Planning Act 2016**

Tribunal Members : **Judge T N Jackson
Mr S Wanderer MRICS**

**Date and venue of
Hearing** : **28 June 2023
Video hearing**

Date of Decision : **17 July 2023**

DECISION

Decision

The Tribunal makes a Rent Repayment Order against the Respondent in the sum of £1,447 to be paid to the Applicant within 28 days of the date of this Decision.

The Tribunal orders the reimbursement of the Applicant's application and hearing fees totalling £300, to be paid to the Applicant within 28 days of the date of this Decision.

Reasons for decision

Introduction

1. On 2 October 2022, the Applicant applied for a Rent Repayment Order stating that the Respondent had committed an offence under section 95 of the Housing Act 2004. The Applicant sought a Rent Repayment Order in the amount of 'upwards of £5000' and reimbursement of his application and hearing fees of £100 and £200 respectively.
2. The Applicant subsequently amended the alleged offence to section 72 of the Housing Act 2004.
3. Directions were issued on 12 December 2022.

Background

The Agreement

4. The Applicant occupied a room at the Property by virtue of a House Share agreement dated 8 October 2021 between the Applicant and the Respondent. It granted exclusive occupation of the designated room to the Applicant and shared use with other occupiers of the Property of the facilities of the common parts of the Property (including bathroom, toilet, kitchen and sitting room facilities). It also included use of Parking Bay #43.
5. The Applicant and Respondent had arranged the House Share agreement in early October 2021 via the website Spareroom.co.uk and not through third parties or agents. The tenancy commenced on 8 October 2021 and ended on 7 April 2022 at a rent of £1000 per month to be paid directly to the Respondent. The Respondent was responsible for the payment of utilities regarding electricity, water/sewer, internet and alarm/security system subject to a fair usage policy of £60 and £40 per person per month for electricity and water respectively.
6. The other two bedrooms were each occupied by sole tenants who moved in within a week of the Applicant's occupation. The Property had been vacant immediately prior to the Applicant's occupation. All tenants shared the sitting room, kitchen, bathroom and separate toilet. As the bedrooms occupied by the other tenants did not have en-suite facilities nor a designated parking space they paid a lower rent than the Applicant. One of the two tenants vacated the Property on 10 March 2022, leaving the Applicant and one other tenant in the Property. The Applicant left the Property on 7 April 2022 at the end of the agreement.

7. On 19 July 2021, under the provisions of Part 2 of the Housing Act 2004, Salford City Council commenced an Additional Licensing Scheme for HMOs which required all HMOs in the Council's area occupied by three or four persons to be licensed. As the legislation allowed a 3- month period for landlords to submit an application, it became an offence to not have submitted an application for a Licence from 19 October 2021. As at 25 July 2022, the Respondent had not made a valid application.

Inspection

8. The Tribunal did not consider that an inspection was required. The parties described the Property as a self -contained flat located in a recently built purpose- built block of flats. It comprised three bedrooms (one with en-suite facilities), open plan sitting room and kitchen, bathroom and separate toilet. The flat was all electric with no gas services.

Hearing

9. The hearing took place by video. Both parties attended and were unrepresented.

The Law

10. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.
11. The 2016 Act applies to an offence committed under section 72(1) of the Housing Act 2004, namely the control or management of an unlicensed HMO.
12. Section 43 of the 2016 Act provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).
13. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. For offences under sections 72(1) of the Housing Act 2004, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
14. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of the following factors:
 - 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 that Chapter of the Act applies.

Submissions

15. Both parties provided written submissions and the Applicant also provided comments on the Respondent's submission as provided by the Directions.

The Applicant

16. The Applicant said that during his occupation of the Property, an HMO Licence was required but that, as at 25 July 2022, no application had been made to obtain a Licence and therefore the Respondent was in breach of section 72(1) of the Housing Act 2004. He provided evidence from the Council dated 25 July 2022 that there was not an HMO Licence as at that date. In his Statement of Case, the Applicant referred to the offence being committed under section 72(1) of the Housing Act 2004 and that reference to section 95(1) in his application to the Tribunal was an error. Noting that the Applicant was unrepresented we accept this amendment as it was made at the beginning of the process and the Respondent has not been disadvantaged as he was able to respond to the correct offence in his Response to the Statement of Case.
17. The Applicant said that the breach denied him his right as a tenant to have the same protection as tenants in licensed HMOs which allow the Council to determine the management standards and condition of properties. This resulted in a failure by the Respondent to complete routine maintenance, protect the Applicant's deposit under a Tenancy Deposit Scheme and the untimely return of the deposit for key and fob. This led to undue stress and an unnecessary level of time and effort invested by the Applicant to deal with the issues. The Applicant sought damages of up to £5000 to reflect the period he occupied the Property whilst the Respondent was in breach of section 72(1) of the Housing Act 2004, namely 19 October 2021 to 7 April 2022 at a rent of £1000 per month. He also sought reimbursement of the application and hearing fees of £100 and £200 respectively.
18. The Applicant confirmed that whilst his room had en-suite facilities and a parking space, for both of which he paid a higher rent than the other tenants, he did not have cooking facilities which he therefore shared with the other tenants. He also shared the open plan sitting room which extended into the kitchen and shared access to the communal bathroom and separate toilet.
19. The Applicant referred to lack of routine maintenance in relation to a broken freezer drawer which had not been fixed by the time he vacated the Property; the hot water temperature being too high which was resolved at some date after 1 December 2021; and a broken slat in his bed for which the Respondent provided a new slat but which was the wrong size. The Applicant therefore moved the broken slat to the bottom of the bed and the matter was not resolved by the time he vacated. The Applicant contacted the Respondent via Whatsapp during these exchanges. Other than these issues, the Applicant's evidence was that as the Property was recently built, it was in good condition and no other matters had needed to be raised.
20. The Applicant's oral evidence referred to the Respondent failing to register the £950 deposit he had paid with a government approved Tenancy Deposit Scheme. After vacating the Property on 7 April 2022, on 23 April 2022, the Applicant queried the non-return of the deposit. The Respondent's partner responded on 27 April 2022 with proposed deductions due to alleged damage. As the Applicant disagreed with the proposed deductions, there followed a written exchange following which, on 1 May 2022, the Applicant advised the Respondent's partner that he would approach the relevant Tenancy Deposit Scheme as he did not think that the parties could come to an agreement. On 5 May 2022, the Applicant received the full deposit with no deductions.

21. As the key deposit of £120 had not been returned at the same time as the £950 deposit, the Applicant raised this with the Respondent's partner on 5 May 2022 and further discussions ensued where the Applicant's evidence was that the Respondent's partner was again trying to discuss the deductions for alleged damage. After compiling evidence, on 23 May 2022 the Applicant issued a complaint with Spareroom.co.uk and, on 31 May 2022, he received a full refund of the key deposit from the Respondent without any comment by the Respondent. The Applicant considered that the return of the deposits was not timely and required him to spend time to collate evidence and chase.

The Respondent

22. The Respondent accepted that he had owned the Property since approximately 2019 and had received the rent directly from the Applicant. At the hearing, the Respondent accepted that, following discussion with the Council, he now accepted that the Property with three tenants sharing facilities was an HMO under Salford's Additional Licensing Scheme. He did not seek to rely on the argument set out in his Response to the Statement of Case that the Applicant was not sharing facilities. The Respondent accepted that the tenants did not form a single household, were working professionals and all tenants used the Property as their only or main residence.
23. The Respondent admitted that he omitted to apply for an HMO Licence at the appropriate time, but gave two explanations. Firstly, he said that the omission was inadvertent as, at the time, he was experiencing great difficulties in his personal life including a bereavement in January 2021, the premature birth of a child with associated health issues in June 2021 and the Respondent contracting coronavirus in December 2021. He was therefore unable to engage in any business transactions including applying for an HMO Licence. This also explained why he had not registered the deposit under an approved Tenancy Deposit Scheme. His evidence was that he had previously registered all deposits received from tenants when letting properties.
24. Secondly, he said that he wasn't aware of the Salford Additional Licensing HMO Scheme and didn't appreciate that the letting to three (as opposed to four) tenants with shared facilities required an HMO Licence. He had owned and let out other properties but had never had an HMO.
25. The Respondent advised that an application was made for an HMO Licence for the Property in December 2022.
26. The Respondent described the Applicant as a good tenant who paid his rent on time and with whom he had had no issues.

Reasons for Decision

27. We considered the application in four stages –
 - a. Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) of the Housing Act 2004;
 - b. Whether the Applicant was entitled to apply to the Tribunal for a Rent Repayment Order;

- c. Whether we should exercise our discretion to make a Rent Repayment Order; and
- d. Determination of the amount of any Order

Offence

Section 72(1) of the Housing Act 2004

28. A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under section 61(1) the Housing Act 2004 but is not so licensed.
29. The Respondent accepts that at the relevant time he owned the Property and directly received rent from tenants who occupied it. The receipt of rent is also evidenced by the Appellant's bank statements. We determine that he was therefore 'a person having control'.
30. We find that the Applicant had use of shared facilities, particularly the kitchen, with two other tenants. We are satisfied from the Applicant's and Respondent's evidence that the Property meets the conditions of the 'self-contained flat' test as set out in section 254(3) of the 2004 Act and we therefore determine that the Property was an HMO by the 13 October (when the third tenant occupied the Property). Under Salford Council's Additional Licensing Scheme, a Licence for the Property as an HMO was required under section 61(1) of the 2004. However, as the Additional Licensing Scheme allowed 3 months from its commencement for landlords to submit an application, an offence could not commence until 19 October 2021. The Respondent accepts that there was no Licence at that date and that he did not apply for a Licence until December 2022.
31. As a tenant left on 10 March 2022 and was not replaced before the expiry of the Applicant's agreement, from that date there were only 2 tenants in the Property including the Applicant and therefore the Property was no longer an HMO from that date as it no longer came within Salford Council's Additional Licensing Scheme.
32. Therefore, the offence was committed between 19 October 2021 and 10 March 2022.

Defences

Duly made application

33. The Respondent applied for an HMO Licence in December 2022. As we are concerned with the period 19 October 2021 to 10 March 2022, the defence under the provisions of section 72(4) of the Housing Act 2004 does not apply.

Reasonable excuse

34. We have had regard to the Respondent's explanation of his personal difficulties at the time. We note that the Respondent did not seek the assistance of an agent to manage the letting of the Property until the personal difficulties ceased. However, despite those difficulties, he was still able to personally transact business with the Applicant via the Spareroom website and arrange for the completion and signing of the House

Share Agreement dated 8 October 2021. He was able to receive the Applicant's deposit prior to the agreement commencing and receive rent throughout the agreement period. It appears that he was also able to arrange agreements with two other tenants as he advised the Applicant as to the dates when the other tenants would be moving into the Property within the same and following week as the Applicant. We also had regard to the Respondent's claim that he was not aware that the Property required an HMO Licence. Whilst we accept that the Property was not a 'typical' HMO, and that he had not previously been the landlord of an HMO, as a landlord it was the Respondent's responsibility to ensure that he was aware of the letting and licensing requirements and ignorance is no excuse. We are therefore not satisfied, on the balance of probabilities, that the Respondent had a reasonable excuse for having control of the HMO which was required to be licensed but was not so licensed.

35. On the basis of the facts and findings set out in paragraphs 28-34 above, we are satisfied beyond a reasonable doubt that between 19 October 2021 and 10 March 2022, the Respondent had committed an offence under section 72 (1) of the 2004 Act, namely being a person having control of an HMO which was required to be licensed under section 61(1) of the 2004 Act but was not so licensed.

Entitlement of the Applicant to apply for a Rent Repayment Order

36. We find that the Applicant was entitled to apply for a Rent Repayment Order. The offence relates to housing that, at the time of the offence, was let to the Applicant and the offence was committed in the period of 12 months ending with the day on which the application to the Tribunal was made, namely 2 October 2022. The Applicant has provided a copy of the House Share agreement covering the period and has demonstrated by his bank statement that he had paid the required rent during the relevant period.

Discretion to make a Rent Repayment Order

37. Having considered the matter, including in particular the Respondent's written and oral submission, we are satisfied that there was no ground on which it could be argued that it was not appropriate to make a Rent Repayment Order in the circumstances of this case.

Amount of Rent Repayment Order

38. We have had regard to a series of Upper Tribunal decisions regarding the quantification of Rent Repayment Orders. In summary, the following general principles can be derived:
- a. the amount payable does not need to be limited to the amount of the landlord's profit from letting the Property during the relevant period;
 - b. the total amount of rent paid by the tenant during the relevant period is the maximum penalty available, but it should not be treated in the same way as a "starting point" in criminal sentencing, because it can only go down, however badly a landlord has behaved;
 - c. the amount of any reduction will depend on the particular facts of the case;

- d. it will be unusual for there to be absolutely nothing for the Tribunal to take into account under section 44(4), especially if the offence is less serious than many other offences of that type, but the award will usually be for at least a substantial part of the rent;
 - e. unlicensed accommodation may provide a perfectly satisfactory place to live, despite its irregular status, and the main object of Rent Repayment Orders is deterrence rather than compensation. It is not intended to be a windfall for the tenant.
 - f. the Tribunal can take into account other factors not listed under section 44(4) as the circumstances and seriousness of the offending conduct of the landlord are comprised in the 'conduct of the landlord' and ought to be considered.
39. In quantifying the Rent Repayment Order, we adopted the approach set out in paragraph 21 of *Acheampong v Roman and others [2022] UKUT 239 (LC)* as endorsed in paragraph 26 of *Dowd v Martins and others [2022] UKUT 249(LC)* namely:
- a. ascertain the whole of the rent for the relevant period;
 - b. subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example, gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate;
 - c. consider how serious this offence was, compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that the term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step.
 - d. consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

Rent for the relevant period

- 40. The relevant period during which the offence was committed was 19 October 2021 to 10 March 2022 i.e. 4 months and 20 days.
- 41. The Tribunal calculates the rent paid by the Applicant over the relevant period (i.e. four whole months plus twenty days of the final month) was £4,714.

Deduction for utilities

- 42. We accept that the cost of electricity, metered water and the internet can be deducted from the rent paid as the consumption was at a rate chosen by and was for the benefit of the tenants rather than the Respondent. The Applicant accepted that deductions for these items were appropriate.

43. We have had regard to the electricity bills provided by the Respondent for the Property for the period 26 September 2021 to 25 April 2022 in the total sum of £1,530.54 including VAT. This covered a wider period than the relevant period with which we are concerned. We therefore disregard the bill 26 March 2022 to 25 April 2022. In relation to the bills for 26 September 2021 to 25 October 2021, and 26 February 2022 to 25 March 2022, we divided each by the number of days to get the daily cost in those billing periods to allow calculations to reflect the start and end of the relevant period. The total cost of electricity during the relevant period amounts to £1,030.75, which divided by the three tenants amounts to £343.58 per tenant, say £344.
44. In relation to water which was metered, the Respondent did not have the bills but had estimated £100-£150 a month which the Applicant considered to be high and we agree. With the exception of one tenant, who for a period of time, worked one day a week at the Property, the tenants were out of the Property during the day. Based on the description of the Property, particularly that it was very recently built and therefore built to modern standards, based on its general experience, the Tribunal determined that £70 a month was appropriate, resulting in a total cost in the relevant period of £326 (£280 + 20 days @ £2.30 a day). After dividing the cost by the three tenants, this amounts £108.66 per tenant, say £109.
45. In relation to the internet charges, the Respondent did not have the bill, and estimated it to be £80 a month. The Applicant did not dispute this estimate. Based on the Tribunal's general experience and the type of Property, £80 a month seemed to be reasonable, resulting in a total cost in the relevant period of £372.60 (£320 + 20 days @ £2.63 a day). After dividing by three, this amounts to £124.20 per tenant say £125.
46. The total deductions are £578. Once subtracted from the rent paid during the relevant period of £4,714, we determine the total is £4,136.

The seriousness of the offence

As confirmed in several Upper Tribunal cases, Section 72(1) offences are generally less serious than other Rent Repayment Order offences. Further, in this particular case, we found the offence to be low on the scale of section 72(1) offences. The Respondent failed to take sufficient steps to inform himself of the regulatory requirements associated with letting a property in Salford and appeared to be unaware of both the Additional Licensing Scheme and the possibility that the sharing of facilities and the number of tenants could lead to a question as to whether the Property fell within the definition of an HMO and whether it needed an HMO Licence. Although the Respondent owned other properties, he had never previously owned an HMO. However, we accept that the Property is not the 'usual' HMO. After being made aware by the Applicant towards the end of August 2022 of the need for a Licence, the Respondent subsequently applied for a Licence in December 2022, which we noted was at least 3 months later.

47. We do not accept the circumstances of the period of personal difficulty as mitigation. The Respondent ignored his responsibilities as landlord towards his tenants rather than make alternative arrangements for the provision of the landlord role, for example by an agent, until the personal difficulties had eased. Despite the personal difficulties, he was still able to let out the Property to three tenants, receive the

deposits and rent and liaise with the Applicant regarding the issues the Applicant had raised. However, we do not consider him to be a bad landlord.

The Property had been built recently and therefore one must presume to modern standards. The Applicant confirmed in oral evidence that other than the broken freezer drawer, broken bed slat and water temperature, he did not need to raise concerns regarding the Property, nor has he referred to any health and safety hazards or defects in the Property. There is no suggestion that the Property would not have qualified for an HMO Licence if it had been sought. We consider the broken freezer drawer and broken bed slat as de minimis. In relation to the water temperature this was addressed once raised and adjustments made to the relevant mechanism. The Property was in good condition and a satisfactory place to live with very limited disadvantage to the tenant.

We are mindful that a Rent Repayment Order is not intended to be a windfall for a tenant who has lived in an unlicensed but otherwise perfectly satisfactory property. Having regard to the matters mentioned above we consider that an award of 35% of the rent paid in the relevant period minus utilities reflects the seriousness of the offence in this case. This amounts to £1,447.60, say £1,447.

Adjustments for section 44

Conduct

48. There is no evidence to challenge the conduct of the Applicant. The Respondent advised that the Applicant paid his rent on time and his deposit had been returned in full at the end of the tenancy without any deduction due to damages. Whilst there had been a discussion regarding potential deductions for alleged damage which the Applicant disputed, these were not subsequently charged to the Applicant.
49. In relation to the Respondent, whilst we note the Applicant's concerns regarding what he describes as the 'routine maintenance issues', we regard them as de minimis. However, it is clear that the Respondent failed to register the deposit with a Tenancy Deposit Scheme. We do not accept the mitigation of the period of personal difficulties for the period as previously rehearsed. The benefit of the Tenancy Deposit Scheme is that it requires the landlord to return the deposit within 10 days of both parties agreeing the amount the tenant will get back. If there is a dispute, the deposit is protected in the scheme until the issue is resolved. It also requires the landlord to provide the tenant with certain information regarding the deposit within 30 days of receiving it, which includes details of the Scheme in which it's placed and its dispute resolution service.
50. In this case, when it was clear to the Applicant that there was no agreement as to the amount to be returned and he so advised the Respondent's partner of this on 1 May 2022, the deposit was subsequently refunded in whole on 5 May 2022 i.e. within 4 days. It took longer and further action by the tenant to receive a refund of the key deposit. However, he would, in our view, have had to carry out the same activities even if the deposit had been registered. As we do not consider there to have been any significant detriment to the Applicant, we do not consider that the failure to register the deposit merits any addition to the proposed Rent Repayment Order figure of £1,447.

Financial

51. The Respondent provided oral evidence only of both his income and expenditure in relation to both his personal circumstances and his property assets. Whilst he is not employed, he receives rental income from the Property which is currently let and a further property in Salford and one in Manchester totalling approximately £6300 per month during the period of the offence and more recently £5300 per month. He has significant equity in the three rental properties and in his main residence totalling approximately £900,000. The Respondent did not suggest that there would be financial hardship if a Rent Repayment Order was awarded and we do not consider that there needs to be any adjustment to the proposed figure for reasons of finance.

Conviction

52. We have no evidence that the Respondent had been convicted of any housing related offences or received any financial penalties. There is no reason to adjust the proposed Rent Repayment Order figure

Decision

53. In conclusion, we determine that the appropriate level for the Rent Repayment Order is £1,447.
54. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicant in the above amount within 28 days of the date of this decision, or fails to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicant, then he can recover the amount in the County Court.

Refund of fees

55. As the Applicant has succeeded in his application, it is appropriate to order that the Respondent refund to him the Tribunal fees that he has paid, namely £100 and £200 for the application and hearing fees respectively.

Costs

56. There has been no application for costs by either party and we make no such order.

Appeal

57. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson
17 July 2023