



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

Case Reference : **BIR/44UF/HMK/2023/0011**

Property : **5 St George's Road, Leamington Spa
CV31 3AY**

Applicant : **Francesca Bowden**

Respondent : **Satinder Bains**

Type of Application : **Application for Rent Repayment Order by tenant
Sections 40,41,43 and 44 Housing and Planning Act 2016**

Tribunal Members : **Judge T N Jackson
A McMurdo MSc CIEH**

**Date and venue of
Hearing** : **12 April 2024
City Centre Tower, 5-7 Hill Street
Birmingham B5 4UU**

Date of Decision : **9 May 2024**

DECISION

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Decision

The Tribunal determines that the Respondent has committed a relevant offence within the 12 months prior to the application to the Tribunal being made and makes a Rent Repayment Order against the Respondent in the sum of £1,493.19 to be paid to the Applicant within 28 days of the date of this Decision.

The Tribunal further orders that the Respondent reimburse the Applicant's application and hearing fees totaling £300, to be paid within 28 days of the date of this Decision.

Reasons for decision

Introduction

1. On 30 August 2023, the Applicant applied for a Rent Repayment Order stating that the Respondent had failed to obtain an HMO Licence whilst the Property was being occupied as an HMO. The Applicant sought a Rent Repayment Order in the amount of £4133.59.

Background

2. By tenancy agreement dated 24 January 2022, the Applicant, together with 4 other individuals, rented the Property for an 11- month period commencing 1 September 2022. A deposit of £2200 was to be paid on the signing of the agreement. Total rent of £2200 per calendar month was payable in 4 instalments namely £6600 on each of 1 September 2022, 1 December 2022 and 1 March 2023 and £4400 on 1 June 2022. The tenancy agreement provided that the tenants pay all utilities directly.
3. The agreement required a security deposit of £2200 which was to be protected under the Tenancy Deposit Scheme.
4. The Applicant occupied the Property from 15 September 2022 to 2 July 2023. One tenant occupied from 17 September 2022 with the remaining 3 tenants occupying from the weekend of 24/25 September 2022. The other 4 tenants left within days of the Applicant in early July 2023. All the tenants were full-time students. As at the date of the hearing, no other tenant had made an application for a Rent Repayment Order.
5. Following an inspection by the Council in February 2023 in relation to whether the Property was being let as a student HMO without a valid HMO Licence, on 9 February 2023, the Council served two Notices and a Schedule of Works.
6. An Improvement Notice was served regarding a Category 1 Hazard in relation to Fire and the lack of sufficient fire safety provisions. Fire safety remedial works were required to be commenced no later than 13th March 2023 and completed by 27th March 2023.
7. A Prohibition Order was served relating to a Category 2 Hazard of Crowding and Space in that Bedroom 5 had inadequate floor area for a person aged over 10 years of age. The Prohibition Order required remedial works to increase the floor area of the room from 6m² to a minimum 6.51 m² but was suspended until 1st August 2023 being a date by which the tenancy agreement would have expired.

8. A Schedule of Works was served which set out the requirements to ensure that the Property complied with HMO licensing standards with a completion date of 24th March 2023.
9. Immediately after the inspection in February 2023, the Respondent asked the Council if she was able to apply for an HMO License even though remedial works had been identified. The Respondent was advised that she was welcome to submit an application which would be considered to be 'duly made' once the application forms, fee and supporting certification had been received. The Respondent was provided with a hyperlink to the website and a hard copy application pack was left available for her to collect which she did on 9 February 2023. An application for an HMO Licence was 'duly made' on 12 May 2023.
10. The Respondent, at her initiative, kept in close and regular email contact with the Council officer to provide updates as to remedial work completed under the Improvement Notice and Schedule of Works and sought clarification where necessary. She sent emails to prompt the Council when it had not responded to her earlier emails and where the lack of response and clarification was delaying work starting. Works commenced 11 February 2023 and continued until further inspections on 30 March 2023 and 17 April 2023. On 19 April 2023, the Council confirmed that the Improvement Notice had been completed.
11. On 10 August 2023, the remedial works the subject of the Prohibition Notice were completed and subsequently inspected on 25 August 2023.
12. On 6 October 2023, an HMO Licence was issued by the Council
13. Following a Notice of Intent, on 7 July 2023, the Council served the Respondent with a Final Notice of Civil Penalty in the sum of £6000 which the Respondent accepted and did not appeal.

Inspection

14. Considering the issue to be addressed and the evidence in the bundle, we did not consider it necessary to inspect the Property. The Applicant described the Property as a 5 bedroomed 2 storied semi-detached house. The Respondent further described it as a terraced house built approximately 100 years ago. We considered the plan of the Property attached to the Improvement Notice. The parties agreed that the Property comprised on the ground floor a bedroom, living room, kitchen and bathroom. On the first floor, there were 4 separate bedrooms, two with en-suite bathrooms. The 5 tenants shared the living room and kitchen. Three tenants shared the bathroom on the ground floor, which was also used by the other 2 tenants when more convenient than going to their respective en-suites on the first floor.

Hearing

15. The Applicant and Respondent attended in person and were unrepresented. The Applicant's mother, Mrs Bini, also attended.

The Law

16. 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.
17. The 2016 Act applies, inter alia, to an offence committed under section 72(1) of the Housing Act 2004, (“the 2004 Act”), namely the control or management of an unlicensed HMO.
18. Section 43 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).
19. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. For offences under section 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.
20. 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

The Applicant

21. The Applicant produced the tenancy agreement, copies of bank statements showing rent payments from 30th August 2022 to 31st May 2023 in the total sum of £4840, a letter dated 3rd August 2023 from Warwick Council and a witness statement from one of the other tenants. The letter from the Council confirmed that, following an inspection by the Council in January 2023, the Property was occupied by five households and that the owner had failed to apply or obtain the required mandatory license to operate as an HMO as required by Part 2 of the Housing Act 2004. The owner submitted a duly made application to license the Property on 12th May 2023. As at the date of the letter, no license had been issued.
22. The Applicant could not recall how she had calculated the £4,133.59 claimed for the Rent Repayment Order but thought it related to the total cost of the 11 months tenancy.
23. The Applicant confirmed that she had not received housing benefit during her occupancy. Under the agreement, the tenants were liable for all utilities.

The Respondent

24. The Respondent produced a bundle which set out a detailed chronology of events particularizing works done on the Property between August 2021 and 13 October 2023, with relevant documentary evidence attached. The evidence included email correspondence with the Council officer to update her on progress and to seek clarification. It also included dated and timed screenshots of text conversations between the Respondent and the Applicant where the former was giving notice and consulting the Applicant, as lead tenant, as to dates entry was required and works to be carried out.
25. The Respondent says that she was not aware that the HMO Licensing requirements had changed in 2018. When the Property was purchased in 2007, there was no requirement to register it as an HMO as it was a 2 storey building. She had understood that the Property was on the non-licensable HMO register. In 2018, the Property had been updated to provide more bathrooms. If she had been aware of the change at that time, then any works required to comply with the regulatory requirements could have been carried out at the same time. Her husband had dealt with property matters until his death in 2018 when she became the property manager. The Respondent had had serious health issues in 2018 which had affected her ability to keep on top of things, but she had not engaged a letting/managing agent at that time and had dealt with matters herself.
26. She stated that she had applied for an HMO License as soon as she was able due to the works required and that she was now a member of various landlord organizations to ensure that she kept up to date with legislation and any changes to landlord's obligations.
27. The Respondent had tried to keep disruption to the tenants to a minimum whilst carrying out the works to comply with the Improvement Notice and the Schedule of Works to meet the requirements of an HMO License.
28. She had waived deductions from the security deposit in relation to damages to a bookshelf, vac and missing keys as a gesture of goodwill to the tenants to reflect that works were having to be carried out whilst they were in occupation. She had maintained the garden even though it was the tenants' obligation as a further gesture of goodwill.

Deliberations

29. We considered the applications in four stages –
 - i. Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 72(1) of the Housing Act 2004
 - ii. Whether the Applicant was entitled to apply to the Tribunal for a Rent Repayment Order;
 - iii. Whether we should exercise our discretion to make a Rent Repayment Order;
 - iv. Determination of the amount of any Order

Offence

Section 72(1) of the Housing Act 2004

30. Under section 72(1), a person commits an offence if they are 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.
31. The Respondent accepts that, at the relevant time, she owned the Property and received rent from the tenants who occupied it, initially through a letting agent but subsequently directly from the tenants who occupied it. The Appellant's bank statements confirm this to be the case. We determine, therefore, that during the period of the agreement, the Respondent, as an owner receiving rent (whether directly or through an agent), was 'a person managing'.
32. We are satisfied from the Applicant's and Respondent's evidence that the Property met the conditions of the standard test as set out in section 254(2) of the 2004 Act and that it was an HMO. The units of accommodation were not self-contained flats. The Applicant had use of shared facilities, particularly the kitchen and living room, with four other tenants. The tenants did not form a single household. The tenants were full-time students and were therefore 'treated' as occupying the premises as their only or main residence under the provisions of section 259 of the 2004 Act. The Respondent accepted at the hearing that, due to the number of households occupying and the shared facilities, the Property was an HMO.
33. Once the 5th tenant started to occupy the Property, under the provisions of The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018, the HMO was required to be licensed under section 61(1) the 2004 Act. As the 5th tenant moved in the weekend of 24/25 September 2022, we determine that the HMO required a license from 25 September 2022 until 2 July 2023 when the Applicant moved out and the number of tenants reduced to 4.
34. The Property was not licensed as an HMO until 6 October 2023.
35. We therefore find that between 25 September 2022 and 2 July 2023, the Respondent managed an HMO that was required to be licensed under section 61(1) the Housing Act 2004 but was not so licensed.

Defences

Duly made application¹

36. The Respondent applied for an HMO Licence on 12 May 2023 as evidenced by the Council's letter. The offence under section 72(1) of the 2004 Act therefore ceased on 11 May 2023. The offence was therefore committed from 25 September 2022 until 11 May 2023.

¹ section 72(4) of the Housing Act 2004

Reasonable excuse

37. Whilst we accept the Respondent's explanation that she was not aware that the law had changed in 2018 regarding HMO Licensing, it was her responsibility as a landlord to ensure that she kept up to date with the regulatory regime when she was acting as a landlord and receiving rent from tenants. A landlord is responsible for the safety of their tenants.
38. Whilst we have sympathy that she had taken over property matters after the death of her husband and had also had personal health issues; these do not absolve her of her statutory responsibilities. Whilst they may be mitigating factors, they do not amount to a defence of reasonable excuse. She had the option of engaging a letting agent/property manager during such times but chose not to.
39. We are therefore satisfied, beyond a reasonable doubt, that between 25 September 2022 and 11 May 2023, the Respondent committed an offence under section 72(1) of the 2004 Act, in that she was in control of an HMO which was required to be licensed under section 61(1) the Housing Act 2004 but was not so licensed.

Entitlement of the Applicant to apply for a Rent Repayment Order

40. We determine that the Applicant is entitled to apply for a Rent Repayment Order. In accordance with section 41(2), 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. We have noted the tenancy agreement, and that the Applicant has demonstrated by her bank statements that she paid the rent (equating to £440 per calendar month) on the instalment dates required by the tenancy agreement.

Discretion to make a Rent Repayment Order

41. Having considered the matter, we are satisfied that there are no grounds on which it could be argued that it is not appropriate to make a Rent Repayment Order in the circumstances of this case.

Amount of Rent Repayment Order

42. 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:
- i. 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;
 - ii. 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;
 - iii. the amount of any reduction will depend on the particular facts of the case;

- iv. 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;
- v. 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.
- vi. 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.

43. 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:

- i. ascertain the whole of the rent for the relevant period;
- ii. 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;
- iii. 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.
- iv. 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

44. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section.

45. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period.

46. The relevant period during which the offence was committed was 25 September 2022 to 11 May 2023 (229 days). The Tribunal calculates the rent paid by the Applicant over the relevant period was £3,318.21 (namely 229 days at £14.49² a day).

Deduction for utilities

47. The tenancy agreement required the tenants to pay for utilities directly. Therefore, there is no adjustment in relation to the cost of utilities.

The seriousness of the offence

48. As confirmed in several Upper Tribunal cases, Section 72(1) offences are generally less serious than other Rent Repayment Order offences. Further, in this case, we found the offence low on the scale of section 72(1) offences.

49. The Respondent failed to take sufficient steps to inform herself of the up-to-date regulatory requirements associated with licensing a property being used as an HMO. She knew it had been on the non-licensable register of HMOs prior to 2018 but appeared never to have checked the situation. Although the Respondent owned 2 other rental properties, they were single let to families and not HMO's and she therefore had limited experience of letting HMOs. However, after being made aware by the Council of the need for a License, the Respondent was prompt in her submission of a 'duly made' application.

50. We note that the Gas Safety certificate appeared to have lapsed between 4 January 2023 and 2 February 2023 when it was remedied. Prior to the Improvement Notice, there had been no Electrical Safety Certificate.

51. There had been no Fire Risk Assessment as at the date of the tenancy agreement and whilst some fire detection was in place, it was not to the standards required of an HMO. We find that the layout of the Property did not cause any special risk of fire. Further, as the Property was let to a group of students who were more likely to live as a cohesive group, particularly in relation to use of the shared kitchen, in our view there was less risk of fire than an HMO let to a non-cohesive group. However, we consider that the lack of fire safety provisions required of an HMO and the fact that it was the subject of an Improvement Notice for this specific reason is an aggravating factor.

52. The Schedule of Works provided to allow the Property to meet the requirements of a licensed HMO does not, in our view, include serious safety risks.

53. The Respondent acted expeditiously in response to the Improvement Notice.

54. The Prohibition Order related to the size of the fifth bedroom, which was 6m² and to which the Council required works so that it was increased to 6.51m². Whilst we accept that minimum space requirements apply, we do not consider that .51m² would have seriously disadvantaged the occupier of that bedroom and note that the Prohibition Order was suspended until 1 August 2023, after the tenancy was due to expire. The Respondent carried out the required remedial works.

55. The Applicant has not suggested that the Property was not in good condition or an unsatisfactory place to live and therefore there was very limited disadvantage to the

² £4840 total rent paid divided by 334 days for period 1 September 2022 to 31 July 2023.

Applicant. The tenants had not initiated the contact with the Council which resulted in the original inspection.

56. The Property subsequently became licensed as an HMO License after works set out in a Schedule of Works were completed.
57. 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 45% of the rent paid in the relevant period reflects the seriousness of the offence in this case. This amounts to £1,493.19.

Adjustments for section 44

Conduct

58. There is no evidence to challenge the conduct of the Applicant. The Respondent advised that the Applicant paid her rent on time and the security deposit was returned in full at the end of the tenancy without any deduction due to damages. The respondent had had no concerns regarding the Applicant as a tenant.
59. In relation to the Respondent, the screenshots of texts between the Respondent and Applicant demonstrate a cordial and friendly relationship with several examples e.g. the Respondent responded positively to tenants' requests regarding the timing of the carrying out of works; the Respondent maintaining the garden although this was the tenants' responsibility. The Applicant confirmed that she had had no issues with the Respondent as a landlord and that the Respondent gave notice when works were required and worked around the tenants. Neither party has provided evidence of the other's conduct which is negative.
60. Having considered the above, we do not make any adjustment arising from either party's conduct.

Financial

61. The Respondent did not provide any detailed information regarding financial matters in response to the Directions and did not wish to do so at the hearing. She works full time. She owns 3 rental properties, including the subject Property, all of which are mortgaged. The Respondent requested the opportunity to pay any Rent Repayment Order made by instalments. Whilst we appreciate that a Rent Repayment Order is an unanticipated expense and may have immediate cash flow implications, in the absence of any evidence as to financial circumstances, we do not consider that there needs to be any adjustment to the proposed Rent Repayment Order figure for financial reasons. The payment of a Rent Repayment Order by instalments is a matter between the parties rather than the Tribunal.

Conviction

62. We have no evidence that the Respondent had been convicted of any housing-related offences. She had received a civil penalty of £6000 from the Council in relation to the offence under section 72 of the 2004 Act, the subject of these proceedings, which she did not appeal. There is no reason to adjust the proposed Rent Repayment Order figure.

Decision

63. In conclusion, we determine that the appropriate level for the Rent Repayment Order is £1,493.19.
64. 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 amount which is reasonable and agreeable to the Applicant, then the Applicant can recover the amount in the County Court.

Costs

65. Neither party has applied for costs, and we make no such order.

Refund of fees

66. As the Applicant has succeeded in her application, it is appropriate to order that the Respondent refund to her the Tribunal fees that she has paid, namely £100 for the application and £200 for the hearing fee. The total of £300 is to be paid by the Respondent to the Applicant within 28 days of the date of this Decision.

Appeal

67. 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.

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Judge T N Jackson