



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

Case Reference : CHI/00ML/HMK/2019/0020

Property : 5 Brading Road, Brighton, BN2 3PE

Applicant : Harrison Casbeard
Emily Monts
Michael Brewster

Representative :

Respondent : Albert Joseph Teek Swayne

Representative : Justin Shale

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(s) : Judge Tildesley OBE
Mr M Donaldson FRICS
Miss J Dalal

Date and venue of the Hearing : Havant Justice Centre, Elmleigh Road,
Havant PO9 2AL
5 December 2019

Date of Decision : 17 December 2019

DECISION

Summary of Decision

1. The Tribunal orders the Respondent to pay the Applicants the sum of £2,100.00 (£700 each) by way of a rent repayment order and to reimburse the Applicants with the application and hearing fees in the sum of £300.00 within 28 days from the date of this decision.

Background

2. On 19 August 2019 the Applicants applied under section 41 of the Housing and Planning Act 2016 for a rent repayment order (RRO) in the sum of £18,000 plus reimbursement of costs of £300.00. The rent claimed of £18,000.00 related to the rent paid of £1,500.00 per month for the period of 12 months from September 2018 to 31 August 2019.
3. The Applicants held an assured shorthold tenancy of 5 Brading Road Brighton BN23 2PE. The tenancy was originally granted for six months from 1 September 2018 to 28 February 2019. The Applicants renewed the tenancy for a further period of six months from 1 March 2019 to 31 August 2019. The rent payable under the tenancy was £1,500.00 per calendar month.
4. The Respondent was named as the Landlord in the tenancy agreement. The Respondent holds a long lease of the property. A copy of the lease was not produced in evidence.
5. The property is a two bedroom flat occupying the ground floor and first floor of a Victorian mid-terraced building of 9 inch solid brick construction with a pitched roof of slate and concrete tiles. A self contained flat under different ownership is located on the lower ground floor of the building with exclusive use of the rear garden.
6. The ground floor of the property comprises an open plan living, dining and kitchen area and a bathroom with a three piece suite located at the rear of the ground floor. On the first floor there are two bedrooms.
7. The Applicants alleged that the Respondent had committed an offence of controlling or managing an unlicensed house contrary to section 95(1) of the Housing Act 2004.
8. On 24 September 2019 Judge Tildesley directed the parties to exchange their statements of case and fixed a hearing for the 5 December 2019 at Havant Justice Centre.
9. On the 5 December 2019 the Applicants appeared in person with Mr Casbeard acting as their spokesperson. Mr Justin Shale of Counsel represented the Respondent by direct access. Mr Casbeard and the Respondent each gave evidence and answered questions in cross-examination. The parties supplied bundles of documents which were admitted in evidence.

Consideration

10. The Housing Act 2004 introduced RROs as an additional measure to penalise landlords managing or letting unlicensed properties. Under the Housing and Planning Act 2016 (2016 Act) Parliament extended the powers to make RRO's to a wider range of "housing offences". The rationale for the expansion was that Government wished to support good landlords who provided decent well maintained homes but to crack down on a small number of rogue or criminal landlords who knowingly rent out unsafe and substandard accommodation.
11. Sections 40 to 47 of the 2016 Act sets out the matters that the Tribunal is required to consider before making a RRO.
12. The Tribunal is satisfied that the Applicants met the requirements for making an application under section 41 of the Act. The Applicants alleged that the Respondent had committed an offence of control or management of an unlicensed house under section 95(1) of the Housing Act 2004 whilst the property was let to them. An offence under section 95(1) falls within the description of offences for which a RRO can be made under section 40 of the 2016 Act. The alleged offence was committed from 1 September 2018 to 19 July 2019 which was in the period of 12 months ending on the day in which the Applicants made their application on 19 August 2019.
13. The Tribunal turns now to those issues that it must be satisfied about before making a RRO.

Has the Respondent committed a specified offence?

14. The Tribunal must first be satisfied beyond reasonable doubt that the Respondent has committed one or more of seven specified offences. The relevant offence in this case is under s.95(1) of the Housing Act 2004, "control or management of an unlicensed house".
15. The Applicants produced a witness statement of Ms Rosie Tiwana, a Private Sector Housing Officer of Brighton and Hove City Council dated 1 October 2019 [A6].
16. Ms Tiwana explained that in March 2018 Brighton and Hove City Council introduced an Additional HMO Licensing Scheme which applied across the City requiring landlords of two storey properties housing three or more unrelated tenants who share facilities to apply for a licence.
17. Ms Tiwana said that on 19 July 2019 she wrote to the Respondent regarding the Applicants' complaint about damp and mould at the

property, and about the property requiring a licence. The Respondent responded the same day to Ms Tiwana thanking her for her advice and bringing to his attention the status of the property regarding the licence [B54]. The Respondent confirmed in the letter that he had applied for a licence and paid the appropriate fee.

18. Ms Tiwana confirmed in her witness statement that at the time of the Applicants' occupation of the property it would have required an HMO licence under the Additional Licensing Scheme.
19. The Applicants supplied an extract from the website of Brighton and Hove City Council entitled "What is a House in Multiple Occupation" [A9]. The extract cited that in the Brighton and Hove area including Portslade, a licence may also be needed if the property has two or more storeys and three or more living there as more than one household.
20. The Respondent provided copies of letters with the HMO Licensing Team at Brighton and Hove Council dated 29 July 2019 and 4 November 2019 together with a copy of the draft licence with conditions [B11-20]. Ms Boles of the Private Sector Housing Team in a letter of 4 November 2019 informed the Respondent that following a meeting at the property a licence can be granted for up to three people/two households.
21. Mr Casbeard said that the Applicants occupied the property as three persons and two households: Mr Casbeard and Ms Monts as one household and Mr Brewster as the other household. Further the Applicants shared the kitchen and bathroom. The Applicants supplied evidence that they paid the rent direct to the Respondent. The Respondent did not challenge Mr Casbeard's evidence.
22. The Tribunal is satisfied on the evidence that the Respondent was required to licence the property under the Additional Licensing Scheme introduced by Brighton and Hove Council in March 2018. The Applicants had supplied a witness statement from a Council officer stating that the property would have required a licence during their tenancy. The Applicants had provided details of the criteria for the licensing of houses under the scheme and given evidence that the criteria were met when they occupied the property. The Respondent admitted that he required a licence for the property, and had gone ahead with an application which was submitted on 19 July 2019. In the light of these facts the Tribunal considers there was no substance to the Respondent's submission that the Applicant had not proved that a licence was required for the property.
23. The Tribunal finds the following facts:
 - a. The property is located in Brighton and Hove and subject to the Additional Licensing Scheme introduced in March 2018.

- b. The Additional Licensing Scheme required properties of two or more storeys with three or more tenants living there as more than one household to be licensed.
 - c. The property comprised two storeys, and was let to the Applicants from September 2018 to 31 August 2019.
 - d. The three Applicants lived at the property as two households sharing the facilities of kitchen and bathroom.
 - e. The Applicants paid rent of £1,500.00 per calendar month to the Respondent under the terms of the tenancy.
 - f. The property was required to be licensed under the Additional Licensing Scheme.
 - g. The Respondent did not have a licence for the property from September 2018.
 - h. The Respondent's reason for not applying for a licence was that he was not aware of the Additional Licensing Scheme until he was informed by the Council on 19 July 2019.
 - i. The Respondent admitted that he did not have a licence for the property.
 - j. The Respondent made a valid application for a licence on 19 July 2019.
24. Under section 95(3) of the 2004 Act if a person can demonstrate that he has applied for a licence and the application remains effective the person has a defence to the offence of no HMO licence at the material time when the application is made. This defence is relevant to this case because the Respondent made a valid application for a licence on the 19 July 2019 which meant that the offence of no licence stopped on 19 July 2019.
25. The Respondent did not put forward a defence of reasonable excuse. In the Tribunal's view, the Respondent's reason for not applying for the licence amounted to ignorance of the law which by itself cannot constitute a defence of reasonable excuse.
26. The Tribunal is satisfied beyond reasonable doubt from the findings above that the Respondent had committed the specified offence of control or management of an unlicensed house contrary to section 95(1) of the 2004 Act from 1 September 2018 to 19 July 2019 in respect of the property and that he did not have a defence of reasonable excuse.

What is the maximum amount that the Respondent can be ordered to pay under a RRO (section 44(3) of the 2017 Act?)

27. The amount that can be ordered under a RRO must relate to a period not exceeding 12 months during which the landlord was committing the offence. The Tribunal has decided that the Respondent committed the offence from the 1 September 2018 to 19 July 2019, a period of ten months and 19 days.
28. The Applicants paid the Respondent a total rent of £17,700.00 for the 12 month tenancy. The Respondent had given the Applicants a refund of £300.00 for the month of August 2019.
29. In order to arrive at the maximum amount payable, the Tribunal is required to deduct from the £17,700.00, the rent paid for August (£1,200.00) and the rent for the period 19 to 31 July 2019 (£629.03). The maximum amount payable by the Respondent under a RRO is £15,870.97.

What is the Amount that the Respondent should pay under a RRO?

30. In determining the amount, the Tribunal must, in particular, take into account the conduct and financial circumstances of the Respondent in his capacity as landlord, whether at any time the Respondent had been convicted of a housing offence to which section 40 applies, and the conduct of the Applicants.
31. The Respondent explained that he purchased the property around June 2017 with the intention of living there as his place of residence. The Respondent said that at the time of the purchase his contract as a mammal watcher for offshore oil and gas companies had come to an end and he was looking for work in the UK. The Respondent chose Brighton because he had enjoyed visiting his sister when she lived there and it had good rail communications with London where he expected to obtain work. The Respondent felt that he would get better value for money property in Brighton than in London.
32. Unfortunately for the Respondent events did not turn out as planned. His original mortgage offer was withdrawn because he had ceased working offshore and he was unable to obtain a new mortgage. His parents lent him the money to purchase the property by raising a mortgage on their home. The Respondent obtained a job in Southampton as a security consultant installing security systems on shipping which was near his parents' home in the New Forest. The Respondent decided to live with his parents and rent out the property.
33. The Respondent has remained at his parents' home. The property in Brighton is the sole property that he owns. The Respondent has

now obtained an interest free mortgage by virtue of his employment in the UK for the past two years.

34. The Respondent earns about £40,000 per annum from his employment as a security consultant. The Respondent stated that his gross profit on the rental income from the property during the year in question was £2,317.01 with a net profit of £1,853.61. The Respondent explained that he had mortgage payments of £12,350.11 per annum, ground rent of £200 per annum and a service charge of £1,003.85 per annum which were deductible expenses from the rental income of £17,700.00 received from the Applicants.
35. The Respondent said that he was aware of the national requirement to licence HMOs which had five tenants from different households. The Respondent, however, asserted that he did not know that Brighton and Hove Council had introduced an additional licensing scheme which brought a lot more properties including his own under the licensing regime. The Respondent pointed out that he lived in the New Forest and that he had no regular contact with what was going on in Brighton. The Respondent appeared to rely upon his “local builder” for advice on letting and who was not aware of the particular circumstances in Brighton. The Respondent stated that he had complied with the other legal requirements imposed upon landlords, namely up to date gas and electricity certificates and an Energy Performance Certificate.
36. The Respondent said that he only discovered the necessity to licence the property when he received the letter from Ms Rosie Tiwana of Brighton and Hove Council on the 19 July 2019, which was primarily about the issue of damp and mould in the property. The Respondent immediately acted upon that advice and applied for a licence with the appropriate fee on the same day. The Respondent has not been prosecuted or received a financial penalty for not having licence. There was no evidence before the Tribunal that the Respondent had previous convictions for “housing” offences.
37. On 4 November 2019 Ms Caroline Bowles of Brighton and Hove Council inspected the property in connection with the Application for a licence. The Council indicated that it was prepared to grant a licence until 28 February 2023 with a maximum number of three persons and two households.
38. The draft licence was subject to special conditions which included (1)the erection of partition between living room and hallway so as to provide a safe means of escape in the case of a fire, (2) a new lock to the front door which could be opened easily without the use of a key, (3) a display of a notice giving contact details of the owner and the person to call in an emergency, (4) provision of fire blanket, (5) the installation of a substantial door to the first floor rear

bedroom, (6) the provision of a mechanical extractor in the kitchen, (7) the erection of a suitable and secure banister and handrail to the staircase, (8) the supply of a fire detection and alarm system including a heat alarm in the kitchen, (9) a smoke alarm in the lounge and smoke detectors in suitable position in the hallway at ground level and first floor level, and (10) ensure a minimum of 270mm of loft insulation in the roof space [B17-20].

39. The Council gave the Respondent 12 months in which to complete the necessary works associated with the special conditions. The Tribunal understands that the Respondent is carrying out those works and has not let the property in the meantime.
40. The Respondent accepted that the back wall of the property suffered from damp, and that mould was present particularly in the rear bedroom occupied by Mr Brewster. The Respondent said that he had informed Mr Brewster of the damp problem when he inspected the property before taking on the tenancy. The Respondent stated that he arranged for the property to be deep cleaned to remove mould and provided the Applicants with dehumidifiers to relieve any problems.
41. Mr Casbeard when taking up occupation of the property highlighted several issues with the property including the issue of mould in the back bedroom. The Respondent explained that he had been in touch with the Management Company for the freeholder to investigate the causes of the damp, and that he was doing everything he could. The Respondent stated that the necessary repairs to the rear wall and roof to stop water ingress were expensive major works which were not his responsibility under the lease. The Respondent said that the leaseholder of the lower ground floor flat could not afford to pay his contribution to the service charge which was one of the reasons why the repairs had not been carried out.
42. The Applicants pointed out that the Respondent's progress in tackling the damp issue was painfully slow, and that no works had been done to rectify the problem during their 12 month tenancy.
43. The Respondent did not arrange for a damp survey of the property until it was suggested by Ms Tiwana in her letter of the 19 July 2019. The Respondent eventually obtained a damp report prepared by JW Surveys dated 21 October 2019. The report found the property to be suffering from high levels of damp to the rear elevation of the ground and first floor which was due to a combination of defective render to the rear elevation and external party wall, the use of inappropriate paints to the rear elevation and the lack of ventilation and heating. The Respondent reduced the rent for August by £300 as a result of the Applicants' complaint to the Council.

44. The Applicants identified that the oven was unsafe and had moved forward because it had been balanced precariously on bricks. The Respondent first thought that the Applicants had been responsible for moving the oven but then accepted responsibility and rendered the siting of the oven safe.
45. The Applicants said that it was extremely difficult to obtain affordable property in Brighton to rent. They had limited means and many landlords were reluctant to let properties to a student or a couple. According to the Applicants, it took over three months to find the Respondent's property.
46. The Applicants accepted that they renewed their tenancy for a further period of six months from 1 March 2019. Mr Casbeard said that the Applicants did not have the time and the resources to look for a new property to rent because both he and Mr Brewster worked long hours and that he and Ms Monts had spent time at Ms Monts' home in America in January 2019.
47. Mr Casbeard considered the Respondent should have taken his responsibilities as a landlord more seriously. Mr Casbeard asserted that the Respondent was running the property as a business and that he had an obligation to satisfy himself that he met the legal requirements for letting a property. In Mr Casbeard's opinion, the Respondent's explanation that he was not a professional landlord was weak, and if the Respondent was not up to the job he should have appointed a managing agent.
48. The Tribunal finds in relation to the Respondent's conduct and financial circumstances:
 - a. The Respondent originally purchased the property for his own use but then decided to let it following a change in personal circumstances.
 - b. The Respondent did not own or let another property. The Respondent was in full time employment and did not depend upon the rental income from the property for his livelihood. In this sense the Respondent was not a professional landlord.
 - c. The Respondent did not have a reasonable excuse for his failure to licence the property under the additional licensing scheme introduced by Brighton and Hove Council. The Respondent did not comply with the legal requirements in respect of the Applicants for at least ten months. The Tribunal is, however, satisfied that the Respondent's failure was due to inadvertence and negligence rather than a deliberate act on his part. The Respondent remedied his default as soon as he discovered that he had not met his legal obligations.

- d. The effect of the Respondent's failure to licence was that the property did not meet the required standards for houses under the additional licensing scheme. The standards not met related to fire safety including a safe means of escape and the risk of falls from the stairs because of the absence of a suitable and secure handrail. The Tribunal does not accept the Respondent's submission that the property is suitable to let in its present condition because he has been given 12 months in which to carry out the necessary works to bring the property up to the required standards. The Tribunal is satisfied that a property that poses a real risk to the safety of residents in terms of fire and falls from height does not meet the ordinary and natural meaning of suitable.
 - e. Although not directly related the Respondent's failure to licence the property, the Tribunal finds that the rear of the property was in disrepair which caused a significant damp problem, and posed a potential risk to the health of Applicants. The Tribunal accepts that the Respondent was constrained by the terms of the lease to effect the necessary repairs but in the Tribunal's view the Respondent should have been more proactive in dealing with the problem.
 - f. The Respondent made a gross profit of £2,317.01 and a net profit of £1,853.61 from his letting of the property to the Applicant. The Respondent had an annual income of £40,000 from his employment.
 - g. The Respondent was not prosecuted and did not receive a financial penalty for the offence of having no licence. The Respondent had no previous convictions for housing offences.
49. The Tribunal finds that the Applicants were not complicit in the circumstances giving rise to the Respondent's failure to obtain a licence for the property. The fact that the Applicants renewed the tenancy for a further period of six months had no bearing upon the amount of the RRO. Likewise the Respondent's assertion that the Applicants' living style contributed to the presence of the mould at the rear of the property was not substantiated on the evidence.
50. The Tribunal starts its determination on the size of the RRO by considering the decision of the Upper Tribunal in *Parker v Waller* [2012] UKUT 301. The then President of the Upper Tribunal referred to Hansard to discover the purpose of the legislation for introducing RROs in favour of tenants. The President decided that the RROs have a number of purposes, namely:
- “to enable a penalty in the form of a civil sanction to be imposed in addition to the fine payable for the criminal offence of operating an unlicensed HMO; to help prevent a landlord

from profiting from renting properties illegally; and to resolve the problems arising from the withholding of rent by tenants”.

51. Following his analysis the President concluded that

“There is no presumption that a rent repayment order should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The Tribunal must take an overall view of the circumstances in determining what amount should be reasonable”.
52. The 2016 Act extended the scope of rent repayments orders with an emphasis upon rogue landlords not benefiting from the letting of sub-standard accommodation and it also removed the requirement for the Tribunal to determine such amount as it considered reasonable for the eventual order.
53. The structure of the 2016 legislation requires the Tribunal to determine first the maximum amount payable under an RRO and then to decide the actual amount payable by taking into the circumstances of the case, having particular regard to specific factors.
54. Mr Shale for the Respondent contended that the Tribunal had the power not to make a RRO. Mr Shale relied on the decision in *James Fallon v Samantha Wilson and two others* [2014] UKUT 0300 (LC) where the Upper Tribunal set aside the RROs imposed by the FT Tribunal.
55. This Tribunal did not find the decision in *James Fallon v Samantha Wilson* helpful to the circumstances of this case. The Upper Tribunal’s decision was based on an analysis of the 2004 legislation and the FT Tribunal’s failure to consider the requirements of that legislation.
56. In this case the Tribunal determines that maximum amount payable by the Respondent under a RRO is £15,870.97. The Tribunal then has to consider whether the findings on the Respondent’s conduct and financial circumstances, and the Applicants’ conduct merit a reduction in the maximum amount payable.
57. The Tribunal has found in the Respondent’s favour that he was not a professional landlord and that his failure to licence the property was an inadvertent act rather than a deliberate one. The Tribunal is satisfied that the Respondent did not fit the description of a rogue or criminal landlord.
58. The Tribunal weighs the findings in the Respondent’s favour against the findings that (1) the property did not meet the required standards for houses under the Additional Licensing Scheme which

in turn posed a real risk to the safety of Applicant in terms of fire and falls from height and (2) that the Applicants were not complicit in the circumstances giving rise to the Respondent's failure to obtain a licence for the property.

59. Having regard to the above findings the Tribunal determines that a RRO should be made and that the amount should be equivalent to the profit obtained by the Respondent from the unlawful letting of the property to the Applicants during the period of ten and half months. The Tribunal decides on an amount of £2,100.00 (£700 to each Applicant). Mr Shale accepted that if an order was made which was not a nominal amount the Respondent should reimburse the Applicants with the application and hearing fees totalling £300.

Decision

60. The Tribunal orders the Respondent to pay the Applicants the sum of £2,100.00 (£700 each) by way of a rent repayment order and to reimburse the Applicants with the application and hearing fees in the sum of £300.00 within 28 days from the date of this decision.

RIGHTS OF APPEAL

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.