



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

Case Reference : **LON/00AQ/HMK/2019/0009**

Property : **38 Peel Road, Harrow Weald,
London HA3 7QU**

Applicants : **Mr Matthew Flannelly**

Representatives : **Flat Justice Community Interest
Company Limited**

Respondents : **Mr Kwasi Affum (1)
Mrs Mariela Affum (2)**

Representative : **Not known**

Type of Application : **Application for a rent repayment
order by tenant**
Sections 40, 41, 43, & 44 of the Housing
and Planning Act 2016

Tribunal Members : **Judge N Hawkes
Ms S Coughlin MCIEH
Judge N Rushton QC**

**Date and venue of
hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **9 May 2019**

DECISION

Decision of the Tribunal

The Tribunal makes a rent repayment order in favour of Mr Matthew Flannelly in the sum of £3,217.50.

The application

1. By an application dated 8 January 2019, which was received by the Tribunal on 14 January 2019, Mr Matthew Flannelly applied for a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016 (“the 2016 Act”). The Respondents to this application are Mr Kwasi Affum and Mrs Mariela Affum.
2. On 16 January 2019, the Tribunal issued Directions leading up to a final hearing which took place on 29 April 2019.
3. It is common ground that Mr Flannelly was a tenant of 38 Peel Road, Harrow Weald, London HA3 7QU (“the Property”) from 9 December 2017 until 8 December 2018 and that he paid rent in the total sum of £6,435 during this period. Mr Flannelly seeks a rent repayment order in the sum of £6,435 in these proceedings.

The hearing

4. Mr Flannelly did not attend the hearing but he was represented by Mr Guy Morris and Mr Daniel Herm-Morris of Flat Justice Community Interest Company Limited (“Flat Justice”). Mr Affum attended the hearing on behalf of both of the Respondents.
5. On the morning of the hearing, Mr Affum informed the Case Officer that his train had been delayed and he arrived at the Tribunal building approximately 25 minutes late. The start of the hearing was put back until 10.25 am in order to enable him to attend.
6. The Tribunal heard oral evidence from Mr Affum. The Tribunal was surprised that Mr Flannelly did not attend the hearing in order to give oral evidence.
7. Mr Morris and Mr Herm-Morris informed the Tribunal that they have no surveying or property management qualifications and that they have never been to the Property. Accordingly, no person attended on behalf of the Applicant who was in a position to give oral evidence.
8. Mr Morris and Mr Herm-Morris also informed the Tribunal that they have no legal qualifications. However, by rule 14 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, there is

no requirement for a representative appointed by a party to be legally qualified.

The Tribunal's determination

9. Section 40 of the 2016 Act provides that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent which has been paid by a tenant.

10. Statutory guidance for local housing authorities concerning rent repayment orders under the 2016 Act was published on 6 April 2017 ("the Statutory Guidance"). The Tribunal has had regard to the Statutory Guidance in determining this application.

11. Section 41 of the 2016 Act provides:

(1) A tenant ... 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."

12. Section 43 of the 2016 Act provides:

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.

Whether the Tribunal is satisfied beyond reasonable doubt that the Respondents have committed a relevant offence

13. The relevant offences are set out at section 40 of the 2016 Act. They include the offence under section 72(1) of the Housing Act 2004 ("the

2004 Act”) of controlling or managing a unlicensed house in multiple occupation (“HMO”).

14. Section 72 of the 2004 Act provides, so far as is material:

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

...

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1)

15. By section 263(3) of the 2004 Act:

(3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises ... or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

16. At the commencement of the hearing, Mr Affum confirmed that it is not in dispute that he and Mrs Affum are correctly named in the application to the Tribunal as Respondent landlords. Their names and their contact details are set out on the final page of Mr Flannelly’s tenancy agreement under the heading “The Landlord’s Contact Details”. Further, since 13 April 2016, they have been the registered proprietors of the freehold interest in the Property and Mr Affum has now made an application for an HMO licence as the proposed licence holder.

17. On the second page of the tenancy agreement, Viable Properties Limited (“Viable”) is said to be “Agent/Landlord(s)”. Mr Affum gave evidence that Viable receives the rent received from the letting of the Property. He stated that he is a director of Viable but that neither he nor his wife hold shares in the company. Accordingly, on Mr Affum’s evidence, the Respondents are persons managing the Property within the meaning of subsection 263(3)(b) of the 2004 Act.
18. It is common ground between the parties that, pursuant to the London Borough of Harrow’s Additional Licensing Scheme, from 1 March 2016 to date the Property has required an HMO licence if occupied by 3 or more people who do not form a single household.
19. The parties also agree that, throughout the period of Mr Flannelly’s tenancy, the Property required an HMO licence. Mr Affum submitted that the Respondents have not, however, committed an offence under section 72(1) of the 2004 Act because they had a “reasonable excuse” for managing the Property without the required licence.
20. Mr Affum gave evidence, which the Tribunal accepts, that:
 - (i) In 2015, he researched the HMO sector and noted that the London Borough of Harrow had different rules from certain other local housing authorities. At this time, Mr Affum believed that an HMO in the London Borough of Harrow only required a licence if let to 4 or more people.
 - (ii) Mr Affum cannot now recall whether or not he carried out further research when he and Mrs Affum purchased the Property in 2016.
 - (iii) In November 2018, Mr Affum checked the London Borough of Harrow’s website and found that it stated that an HMO licence was required if an HMO was let to 4 or more people.
 - (iv) He did not check the London Borough of Harrow’s Designation because he assumed that “the Council’s own website was as good as their Designation”.
 - (v) After the issue of this application, Mr Affum checked the London Borough of Harrow’s website again and found that the reference to “4 or more people” had been changed to “3 or more people”.
 - (vi) However, on searching the internet, he found a screenshot of the London Borough of Harrow’s

website which was taken at the time when it referred to “4 or more people”. This screenshot was taken by someone with whom Mr Affum has no connection and a copy of this screenshot has been included in the Respondents’ hearing bundle.

21. Mr Affum argued that the Respondents had a reasonable excuse for managing the Property without a licence because they relied upon incorrect information on the Council’s own website which led them to believe that the Property did not require an HMO licence unless it was let to 4 or more people.

22. However, Mr Affum went on to give evidence that, when Mr Flannelly moved into the Property, there were four occupants of the Property forming more than one household. He stated:

“On 9 December 2017 there would have been Bruna, Alex and Matt, the Applicant, and there was one more, Martin. There were three and then Matt joined in December. Bruna moved out not long after Matt moved in because she was not comfortable with Matt living in the house. She handed in her notice so it would have been towards the end of January 2018.”

23. Mr Affum went on to explain that he had not thought that a licence was required on the day on which the fourth person moved into the Property. He said that whilst, Bruna gave negative feedback concerning the Applicant and stated that this was her reason for leaving, she was a student and her course was coming to an end so he had expected her to leave soon in any event.

24. Mr Affum stated that, in respect of another property which had required a licence, the Council had said that it “would rather that he did not kick people out and make them homeless.” However, in the present case, Mr Affum actively took on a fourth tenant and, in any event, he accepted that he had no evidence which suggested that the Council allowed a period of grace before a licence application had to be made.

25. On Mr Affum’s own evidence, the Respondents failed to comply with the statement which Mr Affum had seen online to the effect that a licence was required if the HMO was occupied by 4 or more people. On the basis of his evidence, a licence should have been obtained when Mr Flannelly moved in. The Tribunal is therefore satisfied beyond reasonable doubt that the Respondents had no reasonable excuse for managing the Property without a licence during the period of Mr Flannelly’s tenancy and that the Respondents committed an offence pursuant to section 72(1) of the 2004 Act throughout this period.

26. Mr Flannelly's tenancy ended on 8 December 2018 and this application was made on 1 January 2019. The offence was committed in the period of 12 months ending with the date on which the application was made and Mr Flannelly may apply for a rent repayment order in accordance with 41(2) of the 2016 Act.

The exercise of the Tribunal's discretion

27. Subsection 43(1) of the 2016 Act gives the Tribunal a discretion as to whether or not to make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed a relevant offence.
28. Mr Affum informed the Tribunal that "the Property is operated as a social enterprise". This assertion was unsupported by any documentary evidence and it is uncertain what Mr Affum means by this statement. There is no suggestion that Viable is a registered charity and the precise nature of the relationship between the Respondents and Viable is very unclear.
29. Mr Affum gave evidence that Viable receives the rent from the letting of the Property and that he and his wife are not shareholders in Viable. However, he also gave evidence that, at one stage, he was considering giving up his job as an analyst in order to work for Viable full time.
30. He stated that his wife, who works 4 days a week as a teacher, attempts to work 3 days a week for Viable. Accordingly, Mrs Affum is attempting to work 7 days a week notwithstanding that Mr Affum stated that he travels for work and that they have two children.
31. Paragraph 3(h) of the Tribunal's Directions dated 16 January 2019 provided that the Respondents were to include "Any other documents to be relied upon at the hearing" in their hearing bundle. The Tribunal would expect to see persuasive documentary evidence in support of any assertion that the Respondents gained no financial benefit of any nature from the letting of the Property and Mr Affum did not go so far as to say that there was no financial gain of any kind.
32. Having considered Mr Affum's evidence and the circumstances of this case as a whole, the Tribunal finds that the Respondents are likely to benefit financially from the letting of the Property, although the nature of the benefit which they receive is unclear. In all the circumstances, the Tribunal is satisfied that it is appropriate to exercise its discretion to make a rent repayment order.
33. The amount of any rent repayment order must relate to rent paid by the Applicant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence (see section 44(2) of the 2016 Act). It is common ground in the present case that the relevant period

is the period of Mr Flannelly's tenancy and that the maximum amount of any rent repayment order is £6,435.

34. The Tribunal notes that the conditions set out in section 46 of the 2016 Act (which provides that in certain circumstances the amount of a rent repayment order is to be the maximum that the Tribunal has power to make) are not met.

35. Accordingly, in determining the amount of the rent repayment order in the present case, the Tribunal has had regard to subsection 44(4) of the 2016 Act which provides:

(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.

36. During the course of the hearing, reference was made to two decisions of the Upper Tribunal, namely, *Parker v Waller [2012] UKUT 301 (LC)* and *Fallon v Wilson [2014] UKUT 0300 (LC)*. These decisions concern the amount of a rent repayment order under the provisions of the 2004 Act which apply when a relevant offence started to be committed before 6 April 2017.

37. Subsection 74(5) of the 2004 Act includes provision (the Applicant's emphasis supplied) that:

“...the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers **reasonable in the circumstances**”

38. The Applicant submits that because the words “reasonable in the circumstances” do not appear in section 44 of the 2016 Act:

(i) There should not be any assessment of “reasonable” deductions from the maximum amount of the rent repayment order.

(ii) The Tribunal “has no statutory discretion under the 2016 Act to reduce an award for a rent repayment order by deducting the landlord's costs therefore the Tribunal does not, as a matter of course have to

deliberate on the landlord's expenses claims or calculate any rental profit as a basis for an award.”

(iii) The purpose of the 2016 rent repayment order provisions differ from the purpose of the rent repayment order provisions under the 2004 Act and the Tribunal should therefore not have any regard to *Parker v Waller* or *Fallon v Wilson* in determining this application.

39. Mr Morris stated in his closing submissions that the purpose of the 2016 Act is “nearly only punitive” or “largely penal”. He asserted that awards to local housing authorities under section 45 of the 2016 Act (rent repayment orders in favour of local housing authorities in the absence of a conviction) are, in practice, the maximum amount payable and that the amount awarded by the Tribunal under section 44 of the 2016 Act should also be the maximum sum payable.
40. However, Mr Morris could not point to any specific example of a case in which a local housing authority had received the maximum award under section 45. He nonetheless argued that there is effectively a presumption under section 44 of the 2016 Act that the maximum amount payable should be awarded to the tenant.
41. Mr Affum argued that it is clear that under section 44 of the 2016 Act the amount of any rent repayment order is in the discretion of the Tribunal.
42. In *Parker v Waller*, the Upper Tribunal stated at paragraph 26 (emphasis supplied):

... the occupier RRO provisions have a number of purposes – 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 (sc on the basis of illegality). What amount it would be “reasonable in the circumstances” for an RPT to order to be repaid under an RRO must be considered in relation to these purposes. The following points, in my view, should be borne in mind:

(i) Since the RRO provisions are in their nature penal, an RPT must be satisfied on every matter that is determinative of the tenant's entitlement to an order or its amount. It must be satisfied of the matters set out in section 73(8), and it must take into account the particular matters set out in section 74(6) as well as any other matters that may be material.

(ii) *Since the landlord is liable to suffer two penalties – a fine and an RRO – it will be necessary to take this into account. An RPT should have regard to the total amount that the landlord would have to pay by way of a fine and under an RRO. There may be a tension between the imposition of a fine and the making of an RRO. The maximum fine is £20,000, and this shows the seriousness with which Parliament regards the offence. In the present case the magistrates imposed a fine of £525, which would suggest that they did not consider this particular offence to be other than minor. The RPT, however, is entitled to take a different view about the seriousness of operating the HMO without a licence.*

(iii) *There is no presumption that the RRO 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 RPT must take an overall view of the circumstances in determining what amount would be reasonable.*

(iv) *Paragraph (a) of section 74(6) requires the RPT to take into account the total amount of rent received during any period during which it appears to it that the offence was being committed. It needs to do that because the RRO can only be made in respect of rent received during that period. It is limited to the period of 12 months ending with the date of the occupier's application (see section 74(8)). But the RPT ought also to have regard to the total length of time during which the offence was being committed, because this bears upon the seriousness of the offence.*

(v) *The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not, in my judgment a material consideration or, if it is material, one to which any significant weight should be attached. This is because it is of the essence of an occupier's RRO that the rent should be repaid in respect of a period of his occupation. While the tenant might be viewed as the fortunate beneficiary of the sanction that is imposed on the landlord, it is only misconduct on his part (see paragraph(e)) that would in my view justify the reduction of a repayment amount that was otherwise reasonable.*

(vi) *Payments made as part of the rent for utility services count as part of the periodical payments in respect of which an RRO may be made. But since the landlord will not himself have benefited from these, it would only be in the most serious case that they should be included in the RRO.*

(vii) *Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit*

a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.

43. In *Fallon v Wilson*, the Upper Tribunal stated that “the purpose of the imposition of a RRO is to prevent a landlord from profiting from renting properties illegally” and found that sums paid by the landlord out of the gross rents in respect of “mortgage interest repayments, management charges and home insurance, and payment made in respect of utility charges such as gas, electricity, water rates, council tax, together with sums paid in respect of repairs and maintenance” fell to be deducted from the gross rent (see paragraphs 22(9), 22(4) and 16 of the judgment).
44. In *Parker v Waller* the landlord’s payments in respect of “insurance, gas, electricity, water, council tax and cleaning” were brought into account. In respect of mortgage costs, it was stated “it appears that, although Mr Parker bought the house in 1996, the costs of the mortgage relate to a mortgage that was taken out relatively recently, as he says that he is in negative equity. I am not satisfied, therefore, that the mortgage costs should be brought into the reckoning.” The Upper Tribunal concluded that it would not be appropriate to impose upon the landlord a rent repayment order amount that exceeded his “profit in the relevant period” (see paragraph 42 of the judgment).
45. The Tribunal considers that *Fallon v Wilson* and *Parker v Waller* remain relevant authorities under the 2016 Act. Whilst reference is made to the words “reasonable in the circumstances” in the 2004 Act, much of the Upper Tribunal’s reasoning is not rooted in this specific use of language. The relevant provisions of both the 2004 Act and the 2016 Act are penal in nature and Mr Morris’ statements in closing to the effect that the 2016 Act is “penal” therefore do not justify adopting a different approach.
46. Further, the Statutory Guidance does not support Mr Morris’ assertion that there is a presumption in favour of making a rent repayment order under section 44 in the sum of the maximum amount payable. Paragraph 5.1 of the Guidance makes no mention of any such presumption but rather states:

5.1 Can the First-tier Tribunal only order that the maximum amount of rent must be repaid if the local housing authority or tenant has applied for the maximum amount?

The First-tier Tribunal must order that the maximum amount of rent (up to 12 months) is repaid where the landlord has been convicted of the offence to which the rent repayment order applies. This is regardless of whether or not the local housing authority or tenant has

applied for a lesser amount. Where the landlord has not been convicted, the First-tier Tribunal will determine the amount to be repaid in accordance with section 44 (tenants) or section 45 (local housing authorities) of the Housing and Planning Act 2016.

47. Accordingly, the Tribunal has proceeded on the basis that (i) there is no presumption that there will be a 100% refund of payments made, (ii) the benefit obtained by the tenant in having had the accommodation is not a material consideration (iii) the Tribunal has a general discretion which must be exercised judicially and (iv) the net benefit received by the landlord from the letting is a material consideration. The Tribunal notes that the restriction at section 74(8) of the 2004 Act is not contained in the 2016 Act.
48. It is not suggested that either of the Respondents has a criminal conviction. As regards the conduct of the landlord and tenant, the Tribunal has taken the following matters into account. Mr Affum gave evidence, which the Tribunal accepts, that:
- (i) The Respondents own five properties, four of which are let as HMOs.
 - (ii) Mr Affum mistakenly believed that no licence was needed if there were four people at the Property for only short periods of time. Whilst the Tribunal does not accept that this belief was reasonable, the Tribunal is satisfied that it was genuine and that there was no deliberate intention on the part of the Respondents to flout the law.
 - (iii) Mr and Mrs Affum work, have two children, and they have a limited amount of time.
 - (iv) Mr Affum works full time as an analyst, he travels for work and he stated that he had been “hands off” concerning Viable and that this had been “a mistake”.
 - (v) As stated above, Mrs Affum works four days a week as a teacher and she also attempts to work three days a week for Viable.
 - (vi) Viable has only one full time employee who is a virtual assistant that Mr Affum said was based in the Philippines.
 - (vii) A web page has appeared online stating that Viable is an “HMO Specialist” providing HMO

management services. However, the only clients Viable has ever had are Mr and Mrs Affum. Mr Affum ultimately decided not to offer the advertised services to the general public through Viable and the web page was published in error.

(viii) The Property has at all material times been in good condition and well managed, save for the absence of an HMO licence.

(ix) Unreasonable conduct on the part of Mr Flannelly increased the time and expense of managing the Property (for example, a complaint was received of mouse droppings but no rodents were discovered after a number of visits and complaint was made of a leak but no leak was found).

49. The Tribunal is satisfied that, although Mr Affum had little time to devote to property management, he and Mrs Affum were not amateurs.

50. As regards the financial circumstances of the landlord, Mr Affum has not provided the Tribunal with any evidence of the Respondents' own financial circumstances.

51. He has provided a document headed "Profit and Loss Viable Properties Limited For the period 31 August 2017 to 31 December 2018" ("the Summary of Expenditure"). Although this document is said to be a profit and loss account, it does not record any of the income received by way of rent from the various tenants who were in occupation of the Property during the relevant period.

52. Mr Morris made compelling points that there are no underlying documents to support figures put forward in the Summary of Expenditure; this document was served on the Applicant's representatives during the hearing, having been omitted from their copy of bundle, so they had insufficient time to consider it; and the document covers a longer period of time than the period which is under consideration. Mr Affum stated that the omission of the document from the Applicant's copy of bundle was due to administrative error. In all the circumstances, the Tribunal has placed limited weight on the Summary of Expenditure.

53. For the reasons set out above, the Tribunal has found that it is likely that the Respondents received some form of financial benefit from the letting of the Property. The letting of the Property clearly also involves

significant expenditure (it is common ground that the letting to Mr Flannelly was inclusive of Council tax and utility bills).

54. Doing its best on the very limited evidence available concerning both the outgoings and the likely financial benefit to the Respondents resulting from the letting of the Property, and also taking into account the length of time during which the offence was committed and specific findings set out above, the Tribunal makes a rent repayment order in the sum of £3,217.50. This represents 50% of the rent paid by Mr Flannelly.

Name: Judge Hawkes

Date: 9 May 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).