



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

**Case Reference** : **MAN/00CB/HMG/2019/0008**

**Property** : **2 St Brides Road, Wallasey  
Wirral CH44 8BN**

**Applicants** : **Helena and Michael Swarbrick**  
**Representative** : **Legal Road Limited**

**Respondent** : **Lisa Clayson**

**Type of Application** : **Housing and Planning Act 2016  
Section 41(1)**

**Tribunal Members** : **Laurence Bennett (Tribunal Judge)  
Niall Walsh (Deputy Regional Valuer)**

**Date of determination** : **29 August 2019**

**Date of Decision** : **3 September 2019**

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**DECISION**

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## **The Decision**

1. The Tribunal makes a rent repayment order (RRO) in the sum of £3,600 to Mrs Helena Swarbrick and Mr Michael Swarbrick to be paid no later than 3 months from the date of this decision.

## **The Application**

2. Mr and Mrs Swarbrick apply under section 41 of the Housing and Planning Act 2016 (the Act) for a RRO in respect of 2 St Brides Road, Wallasey, Wirral CH44 8BN (the Property).
3. The application was received on 8 May 2019.

## **The Property**

4. The Property is a 3-bedroom end terrace house with a back garden.

## **The Tenancy**

5. The Applicants occupied the Property under an Assured Tenancy Agreement made 30 June 2018 for a term of 6 months from that date at a rent of £600 per month payable in advance on 30 of each months.

## **Directions**

6. On 24 May 2019, Deputy Regional Judge Bennett made directions for the determination of the application. They included "The Tribunal considers it appropriate for the matter to be determined by way of a paper determination....." The directions gave opportunity for the parties to request a hearing. Neither party made a request.
7. In compliance with directions the Applicants submitted a bundle including witness statements, copy Tenancy Agreement, office copy Freehold Title, financial information and selective licencing documents downloaded from the Local Authority.
8. The Respondent, despite reminder by the Tribunal in the form of a non-compliance letter, the Respondent has not provided evidence or submissions or responded to the application.

## **The Law**

9. The relevant law is set out in the Schedule of this decision.

## **Claimed offence**

10. The Applicants claim that the Respondent failed to obtain a licence as required prior to and throughout the tenancy, in particular from 25 January 2018, the date she was registered as Proprietor.
11. The evidence and submissions are referred to in the Tribunal's conclusions below.

## **Tribunal's conclusions**

12. The sole evidence in this application has been provided by the Applicants. The documentation is persuasive in that it is clear and obvious evidence of its contents. It has not been challenged and we find no reason to doubt the detail contained.
13. On 30 June 2018 the Applicants entered into a tenancy agreement with the Respondent as detailed within the Agreement for a term commencing 30 June 2018 2018 at a rent of £600 per month. They also paid a security deposit of £600.
14. The tenancy was not extended or renewed. An email dated 26 January 2019 from the Applicants to the Respondent gives notice "Last rent to be paid will be on 28 January 2019 and we will return the keys to Harper & Woods by the end of February." There is no suggestion this did not take place.
15. An email dated 1 April 2019 sent by Mr Steven J Bowers, Senior Housing Standards Officer (Selective Licensing) Strategic Housing Services Wirral Council to the Applicant's representatives confirms that the Property "Is located within one of Wirral Council's designated Selective Licensing areas. This specific Licensing Area commenced upon 1 July 2015 and runs through to 31 June 2020." The email notes the dates of the Applicant's occupation and states "I can confirm that between these dates the Council had not received an application for a Licence under Part 3 of the Housing Act 2004. However, a licence under Part 3 of the Housing Act has been subsequently applied for which was subsequently granted on 12 March 2019."

## **Offence**

16. A printout list of granted licences does not include the Property. We find it established beyond reasonable doubt that the Respondent has committed an offence under section 95(1) of the Housing Act 2004.
17. We find that the offence was committed over the period of the Applicants' tenancy and within the period of 12 months ending on 8 May 2019, the date on which the application was made.

18. If there is no conviction for a relevant offence the 2016 Act gives the Tribunal discretion whether to make a RRO and if so, the amount of the order. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the offence was committed. The amount must not exceed the rent paid by the tenants during this period, less any award of universal credit paid to any of the tenants. We are satisfied that the Applicants were not in receipt of state benefits and that the rent was paid from their own resources.

#### Amount payable

19. A RRO can only relate to the rent paid during the period the offence was committed. £3,600 is the maximum amount payable.

20. In determining the amount payable under section 44 of the 2016 Act, the Tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence.

21. We have first considered whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, the offences specified in section 40. There is no relevant conviction consequently the Tribunal has a discretion taking into consideration the section 44 factors.

22. We have had regard to the guidance given by the George Bartlett QC, the President of the Upper Tribunal (“UT”) in *Parker v Waller* [2012] UKUT 301 (LC). This was a decision under the Housing Act 2004 where the wording of section 74(6) is similar, but not identical, to the current provisions. The RRO provisions have a number of objectives: (i) to enable a penalty in the form of a civil sanction to be imposed in addition to the penalty payable for the criminal offence of operating an unlicensed HMO; (ii) to help prevent a landlord from profiting from renting properties illegally; and (iii) to resolve the problems arising from the withholding of rent by tenants. There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period. The Tribunal should take an overall view of the circumstances in determining what amount would be reasonable. The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not a material consideration. The circumstances in which the offence is committed is always likely to be material. A deliberate flouting of the requirement to register would merit a larger RRO than instances of inadvertence. A landlord who is engaged professionally in letting is likely to be dealt with more harshly than a nonprofessional landlord.

23. Section 44 of the 2016 Act does not require the Tribunal consider what is reasonable in the circumstances but neither does it contain a presumption that the full amount will be repayable.

### Conduct of the Landlord

24. The Respondent has not provided an explanation of her failure to comply with Licencing requirements. From the date of her registration as owner and that of the letting to the Applicants, we conclude that she acquired the Property for the purpose of letting and as such can be considered an investor. She engaged agents to manage the letting. We find it incumbent upon her to fulfil her responsibilities although we note that she has since applied for a Licence. We find no reason excusing or mitigating the failure.

### Conduct of the Tenant

25. We have no evidence of unreasonable or inappropriate conduct by the Applicants.

### Other factors including the financial circumstances of the Landlord

26. As neither proceedings nor a financial penalty were instituted by Wirral Council, the Respondent has not incurred a financial loss in relation to the facts. Even if that had been the case, a RRO is to be made in addition to any other penalty or fine.
27. The Respondent has not acknowledged this application and has not provided any facts or circumstances that would support a deduction. The Respondent has profited by the rent paid.
28. The Act provides that the maximum amount that a landlord may be required to repay is the rent paid during the relevant period, less any state benefits. We are required to take into account “the financial circumstances of the landlord”. The suggestion that it would not be appropriate to impose a RRO that exceeds the landlord’s profit in the relevant period, is guidance provided by the UT in *Parker*. The UT's guidance forms part of its function to promote consistent practice by First-tier Tribunals (Carnwath LJ in *Earl of Cadogan v Sportelli* [2007] EWCA Civ 1042; [2008] 1 WLR 2142).
29. *Parker* only applies to a deduction for expenses, where a landlord has not *benefited*. There is no evidence that the Respondent has not derived a benefit from the Applicants’ rent payments. Accordingly, we do not make any deductions.
30. The Applicants request that 12 months rent should be ordered “For the Respondent’s breach of the specified offence.” This is outside the Tribunal’s jurisdiction which extends solely to repayment of rent paid.

## **Determination**

31. Taking all relevant matters into account, we are satisfied that the RRO should be made in respect of the entire rent paid by the Applicants in the sum of £3,600.

## **Cost application**

32. The Applicants request a declaration that the Respondent pays Tribunal fees and legal costs. The Tribunal's jurisdiction to make such order is set out in its Regulations. Should the Applicants wish to pursue an order, they are directed to make a separate application providing full details of the costs incurred, the work done and the relevant charging rates.

**L J Bennett**  
**Tribunal Judge**  
**3 September 2019**

## **RIGHTS OF APPEAL**

1. 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.
2. 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.
3. 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.
4. 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.

## ***Appendix of Relevant Legislation***

### ***Housing Act 2004 (the Act)***

#### **79 Licensing of HMOs to which this Part applies**

- (1) This Part provides for houses to be licensed by local housing authorities where—
  - (a) they are houses to which this Part applies (see subsection (2)), and
  - (b) they are required to be licensed under this Part (see section 85(1) )
- (2) This Part applies to a house if—
  - (a) it is in an area that is for the time being designated under section 80 as subject to selective licensing and
  - (b) the whole of it is occupied either –
    - (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsections (3) or (4), or
    - (ii) under 2 or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsections (3) or (4)

#### **95 Offences in relation to licensing of Houses under this Part**

- (1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1) ) but is not so licensed.

## **Housing and Planning Act 2016 (the 2016 Act)**

### **40 Introduction and key definitions**

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –
  - (a) repay an amount of rent paid by a tenant, or
  - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6	This Act	section 95(1)	control or management of unlicensed house
7		section 21	breach of banning order



- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

#### **41 Application for rent repayment order**

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if –
  - (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
  - (b) the offence was committed in the period of 12 months ending with the day on which the application is made.
- (3) A local housing authority may apply for a rent repayment order only if –
  - (a) the offence relates to housing in the authority's area, and
  - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

#### **43 Making of a 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 had been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined with –
  - (a) section 44 (where the application is made by a tenant);
  - (b) section 45 (where the application is made by a local housing authority);
  - (c) section 46 (in certain cases where the landlord has been convicted etc).

#### **44 Amount of order: tenants**

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in this table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
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an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence
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(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

- (a) the rent in respect of that period, less
- (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account –

- (a) the conduct of the landlord and the tenant,
- (b) the financial circumstances of the landlord,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.