



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

Case Reference : **MAN/00CJ/HMF/2018/0004**

Property : **39 Beatrice Road, Heaton,
Newcastle upon Tyne NE6 5RJ**

Applicant : **Miss Alexandra Wilson**

Respondent : **Mr Gareth Campbell**

Type of Application : **Housing and Planning Act 2016 - Section 41**

Tribunal Members : **S Moorhouse
ID Jefferson**

Date of Decision : **10 April 2019**

DECISION

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The tribunal makes a rent repayment order in favour of the Applicant in the sum of £1.

REASONS

The Application

1. The Applicant applied to the tribunal for a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016 ('the 2016 Act') on 22 November 2018 ('the Application'). Directions were issued on 31 December 2018 pursuant to which the Applicant and the Respondent each made a written submission to the tribunal. The tribunal considered it appropriate to determine the Application on the papers without the need for an inspection, neither party having requested a hearing.

Applicant's Submission

2. The basis for the Application was that the Applicant had rented accommodation at the Property from 31 March 2017, on a 6 month contract to 31 September 2017, which was then continued on a monthly basis until the Applicant vacated her accommodation on 31 July 2018, and that the Property was unlicensed.
3. In her Application the Applicant describes having found the accommodation through an online advert. The number of occupants at the Property varied throughout her occupancy with various changes in tenants. The Applicant describes various issues with the condition of the Property, affecting her enjoyment of her tenancy.
4. Within her submission the Applicant states that she was unaware when she first moved in that the Property was an unlicensed House in Multiple Occupation. She states that after much discussion with the other tenants they decided to contact their local Environmental Health Department at Newcastle City Council as they were frustrated with the living conditions and felt unsafe. She states that Environmental Health could not find the Property on their licensing database.
5. The Applicant states that the Respondent, having received from the tenants a message highlighting the many issues with the Property, served on the tenants eviction notices. These were then retracted when the Council contacted him.
6. The Applicant states that an Environmental Health Officer, Mrs Colette Cassley, attended the Property on a number of occasions, notifying the tenants that the Respondent had been running an illegal HMO and that she had found a Category 1 Hazard and other issues within the Property. The Applicant states that she had been told the Respondent would be interviewed under caution and issued with a civil penalty. However, after some deliberation a simple caution was given which the Respondent accepted on 31 August 2018.

7. The Application follows advice from Newcastle City Council that the Applicant would have grounds to apply for a rent repayment order. The Applicant seeks repayment of 12 months rent, at £350 per month (reduced to £250 for one month due to the kitchen being out of use for 2 weeks) totalling £4,100. She states in the Application that the other tenants will also be applying for rent repayment orders.

Respondent's Submission

8. The Respondent's submission sets out his reasons for opposing the Application. The Respondent does not deny that he committed the offence of operating an HMO without a licence. He confirms that he accepted a simple caution and has supplied a copy of this.
9. The Respondent states that he bought the Property as a home that he resided in with friends. He states that he moved out when his personal circumstances changed but due to falling property prices he decided to continue renting the Property to his friends and, as they moved on, to other tenants. He states that he did not intend to run a business at the time of purchase and was naive to the rules and regulations that applied, including the requirement for an HMO licence.
10. The Respondent states that he was advised by the Applicant in November 2017 that the Property should have an HMO licence and that the Council were subsequently informed. He states that he worked with the Council from March 2018 to conduct the work necessary to bring the Property up to HMO standard. He states that due to his cooperation, his readiness to conduct the work and his genuine remorse for the situation, he was issued with a caution and later granted an HMO licence. A copy of the licence is supplied and the issue date is 19 October 2018.
11. The Respondent submits that when the Applicant became a tenant she was employed as a Senior Environmental Health Technician for Newcastle City Council. He submits that she has held a number of roles relating to housing management since 2013, including employment as a Property Manager for Tyne and Wear Property Services and as an Environmental Protection Officer for North Norfolk District Council, a role that the Respondent submits included HMO inspections. The Respondent submitted a copy of the Applicant's online public profile on 'LinkedIn' which lists her duties in these various roles.
12. The Respondent comments on the following statement by the Applicant within the Application: 'When I first moved in I noticed there was only 1 fire alarm in the kitchen. I asked the landlord straight away if he would put some fire alarms in the communal areas and in my bedroom.' The Respondent comments that the Applicant would have been aware straight away that the Property did not meet licensing requirements, yet did not inform him or the Council, continuing to live in the Property for the following 15 months.

13. The Respondent does not contend that the Applicant had a duty to inform him of his licensing obligations however he does contend that she made an informed decision to continue living in a property that she knew to be unlicensed with the sole intention of being able to apply for a rent repayment order of 12 months rent. He argues that this undermines the system and should be taken into consideration.
14. The Respondent submits that the Applicant requested that a friend of hers move into the Property when a room became available in October 2017, and submits this indicates that she found the Property to be of a suitable standard notwithstanding the issues with the condition of the Property raised in her submission.
15. The Respondent states that the eviction notices were served in an attempt to avoid a continuing breach of licensing requirements and with a view to selling the Property, but that he withdrew these having met with the Council and found that they were not a viable course of action. He states that he is not aware of any other intended applications for rent repayment orders and has provided statements from two tenants who make positive comments about the Respondent as a landlord and state that whilst they are eligible to apply for rent repayment orders they do not intend to do so.
16. The Respondent has supplied various details of outgoings relating to the Property. In relation to his financial circumstances, the Respondent states he spent £11,784 on improvements to the kitchen roof in August 2017 and a further £6,500 in 2018 to ensure the Property complied with HMO requirements. He states that he had to borrow money for this purpose and that he is solely responsible for financially supporting his family given that his wife is on maternity leave following the birth of their first child in December 2018.

The Law

17. The relevant statutory provisions are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.
18. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount to be repaid - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.
19. The Upper Tribunal decisions in *Parker v Waller and others* [2012] UKUT 301 (LC) and *Fallon v Wilson and others* [2014] UKUT 300 (LC) relate to the amount of a rent repayment order under the Housing Act 2004 ('the 2004 Act'). In the 2004 Act, section 74(4) provides that (where there has been no conviction) the tribunal shall order such amount as is reasonable in the circumstances. Whilst section 44 in the 2016 Act does not use the word 'reasonable', given the similarities between section 44 and the other provisions of section 74 of the 2004 Act it is reasonable to conclude that the principle of

'reasonable amount' applies to section 44 and that these Upper Tribunal decisions remain relevant.

20. In the *Parker* case the lower tribunal had ordered 100% rent repayment. The President stated that the critical issue was what criteria should govern the meaning of 'such amount as the tribunal considers reasonable in the circumstances' as used in section 74(5) of the 2004 Act. That depended on its purpose, and for that the President turned to Hansard, discovering three purposes: (1) to provide for further penalty additional to any fine, (2) to help discourage illegal letting; and (3) to resolve problems that would arise from a tenant withholding rent. He then decided that:
 - any fine imposed is a relevant factor
 - there is no presumption or starting point of 100% refund
 - the tribunal should consider the length of time an offence was being committed
 - the benefit obtained by the tenant of having the accommodation is not a material consideration
 - payments in respect of utilities should normally be excluded
 - the culpability of the landlord is relevant - a professional landlord is expected to know better.
21. In *Parker* the President awarded 75% of the landlord's profit less his fine.
22. In the *Fallon* case Judge Cousins referred to *Parker* and confirmed there was no presumption that the repayment should be of the full amount received by the landlord unless there are good reasons why it should be. The tribunal should take an overall view of the circumstances in determining what amount would be reasonable. He went on to confirm that sums paid out by the landlord on utilities and the like and the amount of any fine should be taken into account, as should the profit level.
23. In the present case the tribunal takes all of these considerations into account in reaching a decision.

Findings

24. The tribunal finds that the requirements of section 41(2) of the 2016 are met and that as such the Applicant had the right to apply to the tribunal, for the reasons below.
25. A copy letter from Newcastle City Council to the Applicant, included with the Application, states that their investigation concluded that the Property should have been licensed since August 2017, and that due to the landlord's cooperation throughout the investigation a simple caution was offered and accepted on 31 August 2018. The HMO licence was not issued to the Respondent until 19 October 2018. The Applicant was a tenant from 31 March 2017 until 31 July 2018. The Application is dated 22 November 2018. Therefore accommodation

within the Property was let to the Applicant at the time of the offence (section 41(2)(a)) and the offence was committed within the period of 12 months ending with the day the Application was made (section 41(2)(b)).

26. The tribunal finds also that the requirements of section 43(1) are met - the Respondent has committed an offence to which that Chapter of the 2016 Act applies, in that he operated an HMO without the required licence. This is admitted by the Respondent in accepting a simple caution and he states in his submission that he does not deny having committed the offence. The tribunal may therefore make a rent repayment order.
27. The amount of any repayment is to be determined by the tribunal pursuant to section 44. Provisions within section 46 of the 2016 Act allowing for a maximum repayment in the event that the tribunal makes an order do not apply in the present case because the Respondent was not convicted of an offence nor was a financial penalty imposed.
28. The particular considerations at section 44(4) of the 2016 Act relate to conduct of both parties, landlord's financial circumstances and any conviction(s) to which that Chapter of the 2016 Act applies. There is no evidence of any conviction. The tribunal accepts that the Respondent bought the Property initially to live in with friends and was in ignorance of licensing requirements at the time of letting to the Applicant. There is no evidence that the Respondent has profited substantially from the Property and the tribunal accepts that he has had to take out loans to fund works to the Property in order to bring it up to standard.
29. On the issue of conduct, the tribunal finds that the Respondent has been open with the enforcement authority and with the tribunal. He has cooperated and achieved licensing standards, his licence having been issued on 19 October 2018. The enforcement authority confirm (in their letter to the Applicant of 6 November 2018) that the offer of a simple caution reflects the Respondent's cooperation. The length of time during which an offence was being committed was minimised by his cooperative response once he became aware of licensing requirements.
30. The tribunal find that the Applicant's submission to the tribunal is less than forthright. Neither the statement attached to the Application nor the Applicant's written statement pursuant to directions identify that she was actually an employee of the enforcing authority, although her role as a prosecutor is mentioned within copies of electronic messages included with her submission. Her LinkedIn profile indicates that from May 2016 to April 2017 she was a Senior Environmental Health Technician with Newcastle City Council and that from April 2017 she was a Senior Environmental Health Technical officer with the same authority. Her duties in the former role included preparing reports under the Housing Act and liaising with landlords and tenants on a daily basis. In the latter role she compiled prosecution files and provided evidence in court when necessary. A former role in Norfolk included HMO inspections.

31. In view of its findings as to the Applicant's areas of expertise, the statement in the Application concerning the shortage of fire alarms and the number of lettable rooms, the tribunal finds that it would have been apparent to the Applicant when she decided to rent accommodation at the Property that it fell short of licensing requirements.
32. The Applicant then chose to continue her tenancy, living at the Property for a period expiring around 12 months after the enforcement authority considered the offence to have commenced, subsequently applying to the tribunal for a full 12 month refund of rent.
33. The tribunal accepts the Respondent's submission that the Applicant asked for her friend to be allowed to take a tenancy at the Property when a room became available in October 2017, even though the Applicant knew that the Property fell short of licensing requirements and had expressed various concerns as to its condition.
34. The tribunal determines that the Applicant chose to live in premises that fell short of legal requirements, possibly with the intention to apply for a rent repayment order in the future.
35. By accepting a simple caution, the Respondent formally admitted his guilt. Whilst the caution is not classed as a conviction, it nevertheless may be disclosed in certain circumstances, notified to certain employers, could affect other applications in the future and could restrict travel.

Determination

36. Taking an overall view of the circumstances:
 - the tribunal considers, pursuant to section 43 of the 2016 Act, that in principle a rent repayment order should be made in favour of the Applicant, and
 - the tribunal determines, pursuant to section 44 of the 2016 Act, that the amount to be repaid should be £1.

S Moorhouse
Tribunal Judge
10 April 2019

Schedule

Housing and Planning Act 2016

Section 40

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has 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).....
- (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 by that landlord.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 “control or management of unlicensed HMO”
Section 72(1) provides: (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.

Section 41

- (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.

Section 43

- (1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

Section 44

- (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 the table.
The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.
- (3) The amount that the landlord may be required to pay in respect of a period must not exceed-
- (a) the rent paid 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, and
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.