



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

Case reference : **BIR/00FY/HMK/2019/0093
BIR/00FY/HMK/2020/0001**

HMCTS code (paper, video, audio) : **P: PAPERREMOTE**

Property : **11 Brook Court, Player Street,
Nottingham, NG7 5PP**

Applicant(s) : **(1) Lauren Pearl Allsop
(2) Emily Mary Jackson**

Representative :

Respondent : **Aaron Kong**

Representative : **Uppal Taylor Solicitors**

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 D. Barlow
Robert Chumley-Roberts MCIEH, J.P**

Date of decision : **11 June 2020**

***Corrected* DECISION**

I have corrected this decision in accordance with the power under Rule 50(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The amendments are to the figures in the Decision of the Tribunal; and in paragraphs 45, 46 and 47. Tribunal Judge D. Barlow

Covid-19 pandemic: description of hearing:

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P: PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined at a remote hearing on paper. The documents that I refer to are in the written submissions of the parties, the contents of which were considered by the tribunal.

DECISION OF THE TRIBUNAL

The Tribunal makes a rent repayment order in favour of the Applicants in the sum of £785.00 each, totalling £1,570.00.

REASONS

BACKGROUND

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').
2. The Housing Act 2004 ('the 2004 Act'), Part 3, introduced selective licensing of residential accommodation by local housing authorities.
3. There appears to be general agreement between the parties that the application relies on the fact that the Property falls within Nottingham City Council's selective licencing scheme for private rented houses, which came into force on 1 August 2018 and should have been licensed pursuant to s85(1) of the 2004 Act.
4. Under section 95(1) of the 2004 Act a person who controls or manages a house which is required to be licensed under s85(1), but is not so licensed, commits an offence and is liable on summary conviction to a fine.
5. The criminal sanction for failing to obtain a licence is supplemented by the scheme of civil penalties known as rent repayment orders. Under section 40(1) of the Housing and Planning Act 2016 ("the 2016 Act"), the (former) occupiers of an unlicensed house may apply to the First-tier Tribunal for rent repayment orders. The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that the landlord has committed an offence under section 95(1) of the 2004 Act, whether or not the landlord has been convicted.
6. The Applicants are the former tenants of the Property which is a privately owned second floor flat within a three-storey block.
7. The Respondent is the owner of the Property.
8. Applications were received by the Tribunal on 30 December 2019 and 9 January 2020 from the Applicants, who both applied for a rent repayment order under section 41 of the 2016 Act. The Applicants' allege that the

- Respondent was controlling or managing a house which was required to be licensed under s85(1) of the 2004 Act and was not so licensed.
9. Directions were issued on 17 January 2020 consolidating the applications, following which submissions were made by the parties and copied to each other. The Respondent initially requested an oral hearing but, when the hearing date had to be postponed due to the Covid-19 Pilot Practice Directions, requested a paper determination.
 10. The evidence indicates that the Applicants' occupied the Property from 1 December 2018 to 31 May 2019 under an informal, unwritten tenancy agreement, granted for an indefinite period. They each paid a rent of £325.00 per month by standing order/direct debit to the Respondents bank account, for their period of occupation.
 11. The applications confirm that the Applicants' are requesting rent repayment for the period of six months from 1st December 2018 to 31st May 2019, the later date being the date the Applicants' vacated the Property, totalling £3,900, split as to £1,950.00 each.
 12. The Respondent appears to have already paid a financial penalty of £2,910.00 to the Council, for his failure to licence the Property.

THE LAW

13. The relevant provisions of the 2016 Act, are as follows –

S40. Introduction and key definitions

- (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 ...
- (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.

	<i>Act</i>	<i>Section</i>	<i>General description of offence</i>
6	<i>The 2004 Act</i>	<i>S95(1)</i>	<i>Control or management of an unlicensed house</i>

...

s41 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.

...

s43 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.
- (3) The amount of a rent repayment order under this section is to be determined in accordance with—
 - (a) section 44 (where the application is made by a tenant);

...

s44 Amount of order: tenants

4(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. The amount must relate to rent paid during the period mentioned in the table.

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

THE PROPERTY

14. The Property is a residential flat on the second floor of a 3-storey block at Brook Court, Player Street, Nottingham – the tribunal did not inspect the Property but photographic evidence was provided by the Applicants and the Respondent. In the Applicants' case a series of photographs taken by the Council's licensing enforcement officer on 28 May 2019, three days prior to expiry of the tenancy. In the Respondent's case, a series of photographs taken after expiry of the tenancy.

THE PARTIES SUBMISSIONS

The Applicants' submissions

15. The Applicants, who are unrepresented, state that from 1 December 2018 the Property was unlicensed and remained unlicensed until their departure on 31st May 2019.
16. The Applicants had access to the Property from early November to slowly move in their personal belongings and decorate if needed. The tenancy commenced on 1 December 2018 from which time the Applicants each paid £325.00 per month to the Respondent. The total rent paid by the Applicants during the tenancy was £3,900 split as to £1,950.00 each. Both Applicants provided evidence of bank transactions showing the monthly transfers of rent to the Respondent's account.
17. The Applicants' state that the Property is a 2-bedroom, 2-bathroom apartment on the second floor of a 3-storey building. They also state that they requested a written form of contract a number of times but were never given one. They were told to contact the Respondent on his personal telephone number if anything was wrong with the property, or if they were ending the tenancy.
18. The Applicants make no comment on the condition of the Property or the Respondents conduct other than failing to provide a written form of contract (and accordingly they had no address for the landlord). The Applicants do not say how the Environmental Health Community Protection team at Nottingham City Council became involved, but a letter dated 20 November 2019 from Jonathan Cain, an enforcement officer, addressed to Emily Jackson was attached to the application. The letter refers to Mr Cain's visit to the Property on 28 May 2019. He confirms that the purpose of the visit was to collect evidence to establish an offence of failure of licence and that having completed the investigation the landlord had received a financial penalty. The letter states that the housing authority had proved the offence beyond reasonable doubt and as such, the tenants were entitled to apply to the tribunal for a rent repayment order. The letter went on to explain the tenants' entitlement in more detail and provided a hyperlink to the application form on the gov.co website.
19. Following a direction dated 27 March 2020, that the parties could submit photographic evidence of the condition or other relevant aspects of the property, an email was received on 7 April 2020 from Mr Cain attaching copies of some photographs he had taken on the 28 May 2019 (presumably during his visit). Lauren Allsop also submitted copies of the same photographs by email. There is no commentary or statement with the photographs, from either Mr Cain or the Applicants, to explain the relevance of the photographs to this application.

The Respondent's Submissions

20. The Respondent is represented by Uppal Taylor solicitors on a Pro-Bono basis. They provided a statement of case on 28 February 2020 and a bundle of photographs, with further submissions on 26 May 2020.
21. The Respondent opposes the application on a number of grounds. He is not a landlord of multiple properties. The Property was formerly occupied by his son and/or family members. He acknowledges that the Property falls within the designated area for selective licensing and that it was unlicensed for the duration of the tenancy. He was completely unaware of the licensing schemes or the requirement to licence the Property, but made an application for a licence as soon as the council drew this to his attention. He did not seek to excuse his ignorance and has already paid a significant financial penalty of £2,910.00 without complaint.
22. Immediately prior to the offence the Property was occupied by the Respondent's son. The Applicants' were his friends. The Respondent's son agreed to allow the Applicants to occupy the Property on an informal basis, between friends, to cover the expenses. It was never intended to be a formal tenancy.
23. The Respondent understands that the Applicants, pursuant to their rights, reported him to the local authority. Had they approached him first, he states that he could have rectified his error by making a licence application.
24. The Respondent points to the underlying purpose of the licensing scheme which is to address poor standards in the city's private rented sector as evidenced by the number of lettings of properties that are not safe or of a decent standard. The Respondent contends that the Property was safe and of a decent standard. No complaints as to the state of the Property have been made by the Applicants, it was let fully furnished and no repairs were required. The investigation by the Environmental Health team, into the licence found it to be in a reasonable state of repair.
25. The Respondent's submissions on his photographic schedule reiterate the lack of any complaint by the Applicants about the condition of the Property either during the tenancy or within these proceedings. The Respondent notes that, unlike the Respondent's schedule, the Applicants' photographs focus on specific areas of small sections of the Property that do not reflect its overall condition or quality. The Respondent also notes that the Property forms part of a security controlled complex with a gated entrance. It is of modern build and standard, with cavity walls and double glazing. The communal areas are maintained by a property maintenance company to an excellent standard. He complains that the Applicants failed to properly clean or look after the Property and left without making good holes and unfinished electrical work which the Respondent has had to rectify.
26. The Respondent has not provided a detailed schedule of income and outgoings but in his statement of case and later submissions confirms as follows:
 - a. He has been employed on a minimum wage, as a waiter, zero-hour contract worker in the restaurant sector. He is currently off work due to the covid-19 pandemic and does not know if he will have a job to return to.

- b. The Respondent is a carer for his wife.
 - c. The Property was purchased some years ago for his son, who lived there until he'd saved for a deposit on a family home for himself. When he moved out the Respondent took possession, maintained the mortgage payments and ensured it remained occupied.
 - d. The detailed schedule of photographs submitted show that the Property adds considerably to the quality of rental properties available in the city.
 - e. The Applicants' did not raise any complaint about the standard or quality of the Property during the tenancy or since. They could have remained in possession but chose to leave, instigating an investigation just prior to leaving.
 - f. The Respondent has paid a number of outgoings from the rent including:
 - i. Contents insurance: £110.00 for 6 months
 - ii. Service charge: £575.00 for 6 months
 - iii. Ground rent: £150.00 per year
 - iv. Provision of an electric heater £75.00
 - g. The Responded has never been convicted of an offence under Chapter 4 of the 2016 Act.
27. In summary, the Respondent contends that he has acted honestly in accepting his mistake and in payment of the fine imposed. He has taken steps to rectify his error. He submits that the Applicants now seek to take advantage of his error and substantially benefit from a rent repayment order having enjoyed peaceful occupation of a fully furnished, well maintained property for six months, at the expense of the Respondent. Taking all this into account including the Respondent's financial circumstances, if the Tribunal decide an order should be made, the amount of the order should be minimal.

THE TRIBUNAL'S DETERMINATIONS

28. The Tribunal considered four questions: –
- (i) Was the Tribunal satisfied beyond reasonable doubt that the Respondent had committed an offence under section 95(1) of the 2004 Act, in that at the relevant time he was a person who controlled or managed a house that was required to be licensed under Part 3 of the 2004 Act, but was not so licensed.
 - (ii) Were the Applicants entitled to apply to the Tribunal for rent repayment orders.
 - (iii) Should the Tribunal exercise its discretion to make rent repayment orders.
 - (iv) What should be the amounts of any such orders

29. Offence under s95(1) of the 2004 Act.

- (i) In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord of the Property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 95(1) of the 2004 Act. In his statement the Respondent admitted that he had committed the offence, which was an honest mistake, and confirms that he has already received a financial penalty of £2,910.00 for the offence, which he did not dispute.
- (ii) Throughout the period from 1 December 2018 to 31st May 2019 the Property was within an area of selective licencing for private rented houses, which came into force on 1 August 2018 and should have been licensed pursuant to s85(1) of the 2004 Act.
- (iii) The Property was not so licensed.
- (iv) The Respondent was the person having control of and/or managing Property as defined in s263 of the 2004 Act.

30. Were the Applicants entitled to apply to the Tribunal for rent repayment orders?

The Tribunal determined that the Applicants were entitled to apply for rent repayment orders pursuant to section 41(1) of the 2016 Act. In accordance with section 41(2), the Respondent was committing the relevant offence throughout the period when the Property was let to the Applicants; and the offence was committed in the period of 12 months ending with the day on which the application was made (30 December 2019 and 9 January 2020).

31. Should the Tribunal exercise discretion to make an order?

Subsection 43(1) of the 2016 Act gives the Tribunal a discretion as to whether or not to make a rent repayment order. Given the circumstances of the offence and the need to encourage compliance with licensing regimes, the Tribunal finds it appropriate for the Tribunal to exercise its discretion to make an order.

32. What should be the amounts of such orders?

- 33. Under section 44 of the 2016 Act, the amount of an order must relate to rent paid in a period, not exceeding 12 months, during which the landlord was committing an offence under section 96(1) of the 2004 Act. The Applicants' claim satisfies that condition.
- 34. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. The Applicants each claim a rent repayment of £1,950.00 (totalling £3,900), for the six-month period of the tenancy. The Tribunal accepts that the relevant period is six months. The Applicants' have each provided bank statements showing the rent transfers and the Respondent does not dispute having received six months' rent.

35. The Tribunal's Directions required the parties to provide details of any universal credit/housing benefit paid to the Applicants. No party asserts that either the Applicant was in receipt of universal credit/housing benefit during the applicable period. The Tribunal is therefore satisfied that the maximum amount of the rent repayment order is £3,900.00.
36. 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.
37. In determining the amount of the rent repayment order the Tribunal must have regard to subsection 44(4) of the 2016 Act, which requires that the Tribunal take particular account of:
- (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.

38. Furthermore, in exercising its discretion the Tribunal has taken account of the consideration by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301 (LC); and the observations of the President in that case which have received express approval in subsequent decisions of the Upper Tribunal. Although those observations were made in the context of the 2004 Act, many remain relevant in the context of the 2016 Act regime, although there are some material differences to the wording of section 44 of the 2016 Act, as compared to section 74 of the 2004 Act. Distilling those observations, in so far as they are not displaced by the wording of section 44, the Tribunal has proceeded on the basis that:

- (i) there is no presumption that there will be a 100% refund of payments made. In fact, as section 46 prescribes the circumstances in which the Tribunal must order the full amount, section 44 clearly envisages that a lesser refund is likely.
- (ii) the total length of time during which the offence was being committed bears upon the seriousness of the offence and therefore, the conduct of the landlord.
- (iii) the benefit obtained by the tenant in having had the accommodation is not a material consideration.
- (iv) the Tribunal has a general discretion which must be exercised judicially. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to licence will merit a larger order than instances of inadvertence. Although all landlords should know the law, a landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional
- (v) the net benefit received by the landlord from the letting can be a material consideration where relevant to the financial circumstances of the landlord.

39. Applying the above considerations to the facts of this case the Tribunal determines that various deductions should be made from the maximum sum set out in paragraph 35.

40. The Respondent does not say if the rent included utilities, but does state that he paid other essential outgoings on the Property during the relevant period. A Service Charge for the maintenance of the building and common parts of £575.00 for the 6-month period; ground rent of £75.00 for six months and contents insurance of £110.00, also for six months. He also mentions the provision of an electric fire costing £75.00. Although obliged to pay these outgoings to preserve the landlord's investment they are payments that also had some direct benefit to the tenants (in the case of contents insurance) and some indirect benefit in preserving the amenity of the block. The payments also reduced the net benefit of the rent to the Respondent, which is relevant to his personal financial circumstances. The Respondent also claims to pay a mortgage on the Property but as he has not provided any detailed information on the mortgage, the Tribunal is unable to make any allowance for this.

41. The Tribunal determines that taking account of the Respondents current financial circumstances, there should be deductions to reflect those outgoings paid by the Respondent out of the gross rents received from the Applicants. The Tribunal does not make a deduction for the cost of the electric fire as it appears to have been provided to ameliorate an inefficient heating system. Neither does the Tribunal make any allowance for the alleged failure of the tenants to leave the Property in repair. There was no written tenancy stipulating the party's respective responsibilities for maintenance and repair of the Property and no figures have been provided by the Respondent about the costs of remediation. The Tribunal determines therefore that an appropriate deduction is £760.00 to reflect the service charge, insurance and ground rent paid by the Respondent during the relevant period.

42. The Tribunal has also, placed significant weight upon the following findings drawn from the undisputed statements of the Respondent:

- (i) The length of time during which the offence was committed is relatively short, i.e. six months.
- (ii) The Respondent is a carer for his wife. He is employed on a zero-hours, minimum wage contract in the restaurant sector, which is likely to remain closed for the foreseeable future. There is a likelihood that this will have a significant effect of the Respondents current and future financial position.
- (iii) The Respondent is an inexperienced landlord who failed to licence the Property because he was unaware of the need to do so. Once he became aware of the requirement, he applied promptly to the council for a licence and has not disputed his liability.
- (iv) The Property was purchased as a home for family members and was occupied by his son prior to the Applicants' occupation. They were friends of the Respondent's son. The Respondent let the Property to them on an informal basis to cover the mortgage and outgoings and to maintain occupancy. He is not a commercial landlord of multiple properties.
- (v) The tenancy was otherwise uneventful. There were no complaints regarding the condition of the property or indeed the behaviour of

the Respondent other than his failure to provide a written form of agreement.

- (vi) The Respondent has not at any time been convicted of an offence to which this Chapter applies, but he has paid a substantial financial penalty of £2,910.00 to the council for failing to licence the Property.

43. The Tribunal finds that the offence is at the lower end of the scale in terms of culpability and seriousness and that no harm was occasioned to the tenants. It was committed for a relatively short period. This is not a case of a landlord cynically avoiding the licensing regime with a view to profit. The Respondent, who lacked experience, failed to comply with statutory controls he was unaware of but acted promptly to redress the position once made aware of it and has not sought to excuse himself or dispute liability. He has already paid a substantial penalty from what appears now to be a limited income.

44. Taking the above findings together, the Tribunal determines that it is appropriate to make a further deduction of 50% of net rent paid for the relevant period.

45. The quantification of the rent repayment order is therefore: -

Gross rent for six-month period: £3,900.00

Less deductions from gross rent (paragraph 41): £760.00

Net rent: = £3,140

Less 50% deduction (paragraph 44): = **£1,570.00**

46. The Tribunal therefore confirms the total amount of the Rent Repayment Order as follows:

£785.00 to each Applicant totalling £1,570.00

47. The Tribunal therefore confirms the total amount of the Rent Repayment Order of **£1,570.00**. Payment should be made in full within 28 days of the date of this decision.

Name: D. Barlow

Date: 25 June 2020

Judge of the First-tier Tribunal

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).